
CANADA / JUDGMENT

R. v. L.S.N.

2020 BCCA 109

COURT

British Columbia Court of Appeal

DECIDED

9 April 2020

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2020 BCCA 109 R. v. L.S.N.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. L.S.N.,

2020 BCCA 109

Date: 20200409

Docket: CA46399

Between:

Regina

Appellant

And

L.S.N.

Respondent

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s. 486.4 of the Criminal Code restricting the publication, broadcasting or

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under SOIRA.

Before:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated
September 6, 2019 (R. v. L.S.N., 2019 BCSC 1619, Vancouver Docket 27350).

Counsel for the Appellant:

S.E. Elliott

J.A. Dyck

No one appearing on behalf of the Respondent

Amicus Curiae:

E. Holzman

Place and Date of Hearing:

Vancouver, British Columbia

March 26, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 9, 2020

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Harris

Summary:

The Crown appeals a suspended sentence imposed on an Indigenous offender for sexual interference. Held: Leave to appeal granted; appeal allowed. The reasons for sentence reflect error in principle. Exceptional circumstances do not justify a departure from the proportionality principle. In addition, the sentence is demonstrably unfit. It reflects a clearly unreasonable assessment of the respondent's elevated moral culpability. A sentence of imprisonment of two

years less one day, less credit for time served in presentence custody, is substituted. In addition, a protective probation condition is added to the three-year probation order and an order is imposed pursuant to s. 161(1)(c) for 10 years.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The Crown applies for leave to appeal and, if leave be granted, appeals from a suspended sentence and a three-year probation order imposed on the respondent, an Indigenous offender, following his conviction for sexual interference, contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [2] The offence of sexual interference is committed when a person, for a sexual purpose, touches the body of a person who is under the age of 16 years. The victim of the offence was the respondent's 11-year-old stepdaughter. There were three instances of sexual touching. As is evident, the offence involved a classic breach of trust and the exploitation of the child by a person who stood in loco parentis.
- [3] I understand the Crown to submit that: (1) the reasons for sentence reflect a material error in principle in the application of the fundamental rule that all sentences be proportionate to the gravity of the offence and the degree of responsibility of the offender; (2) the weight the sentencing judge gave to the applicable sentencing principles and objectives reflects a clearly unreasonable exercise of discretion; (3) the judge's factual finding relating to the risk the respondent poses to children reflects palpable and overriding error; (4) the failure of the judge to make an order under s. 161 of the Code reflects a clearly unreasonable exercise of discretion; and (5) the sentence imposed is, in any event, demonstrably unfit; *R. v. Lacasse*, 2015 SCC 64 at paras. 44-46, 51-53 and 83; *R. v. Agin*, 2018 BCCA 133 at paras. 52-53.
- [4] The Crown seeks, as it did in the court below, the imposition of a prison sentence of two years less one day, additional probationary terms to protect children from the risk of re-offence, and an order pursuant to s. 161 of the Code prohibiting the respondent for a period of 10 years from: pursuant to subsection (1)(a), attending places where children under the age of 16 can reasonably be expected to be present; pursuant to (1)(b), seeking or continuing with employment or volunteer activities in a role that involves him being in a position of trust or authority towards a person under the age of 16 years; and pursuant to (1)(c), having contact with a person under the age of 16, unless he does so under the supervision of someone over the age of 18 who is aware of the order.
- [5] The respondent's whereabouts are currently unknown. On January 16, 2020, an order was made appointing amicus curiae. A written submission addressing the Crown's grounds of appeal was filed by amicus on March 9, 2020. In his helpful submissions, amicus emphasized the deferential standard of review that applies on sentence appeals. In addition, he reminds us that s. 718.2(e) of the Code calls upon judges to use a different method of analysis in determining a fit sentence for an Indigenous offender even when, as here, the

circumstances of the case are such that denunciation and deterrence must be given primary consideration.

- [6] This appeal was argued shortly before the release of judgment in *R. v. Friesen*, 2020 SCC 9. In *Friesen*, the Court sent a strong message that sentences for sexual offences against children must increase.
- [7] Crown counsel and amicus advised the Court while judgment was on reserve that they would not be seeking leave to make further submissions addressing the impact of *Friesen* on this case.
- [8] In my view, the reasons for sentence reflect error in principle. In addition, I am of the view that the sentence is demonstrably unfit. In the result, and for the reasons that follow, I would grant leave to appeal, allow the appeal, set aside the suspended sentence and substitute a term of imprisonment of two years less one day. The respondent shall be credited 15 days for time served in presentence custody. I would maintain the three-year probation order but add an additional condition to protect children from the risk of re-offence. I would also impose an order pursuant to s. 161(1)(c) of the Code for 10 years.

II. Procedural History of the Appeal

- [9] Sentence was imposed on September 6, 2019. The Crown filed its notice of appeal on September 26, 2019. The notice of appeal was personally served on the respondent on October 1, 2019. On November 19, 2019, the respondent was served with notice that a case management conference would be held on December 3, 2019. The respondent did not appear for case management. The Crown was given leave to set the appeal down for hearing.
- [10] Since then, the Crown has made repeated but unsuccessful efforts to locate the respondent to serve him with the notice of hearing and the material filed in support of its appeal.
- [11] When the appeal was called for hearing, the respondent was not present in the courtroom. He was paged but did not appear in response. In these circumstances, and with the benefit of the submissions of the amicus, the Court was satisfied that it was in the interests of justice to proceed with the appeal in the respondent's absence.

III. Circumstances of the Offence

- [12] The circumstances of the offence were summarized by the sentencing judge in reasons for sentence indexed as 2019 BCSC 1619:
- [2] During the summer of 2016, the accused, on two occasions, touched the developing breasts of his then 11-year-old stepdaughter. On a third occasion, he lay beside her on a bed, put his hand down her pajamas, and fondled her vagina. There was no digital penetration.
- [3] The offences took place in the accused's home while he was parenting his stepdaughter and others, and while he was in a position of trust and authority.

- [12] The accused has five biological children and two non-biological children, all of whom he raised as his own. The eldest of the two non-biological children is the victim of the offence for which the accused is now being sentenced.
- [13] The victim said she "idolized" the respondent and considered him to be her "full dad". Likewise, the respondent advised the author of the presentence report that he considered the victim to be his own child and treated her as such.
- [14] The victim testified at trial that the respondent was "piss drunk" when two of the incidents occurred, but appeared to be sober on the other occasion. She said the respondent apologized to her for his conduct and asked her not to tell her mother. The victim told the investigating officer she was "devastated" by the respondent's conduct, but still loved him and just wanted him to get help.
- [15] The respondent claims to have no memory of any of these incidents. He told the author of the presentence report that he believes the incidents occurred as described by the victim. He was unable to explain his conduct or identify the factors that may have contributed to it. He expressed remorse for his behaviour, advising the judge that he "feels terrible" about it, understands it was harmful, and appreciates that it will likely have a lasting negative impact on the victim.
- [16] The offence was committed after Parliament enacted the Tougher Penalties for Child Predators Act, S.C. 2015, c. 23. This statute increased the maximum sentence for sexual interference, and other related offences where the victim is under the age of 16, from 10 to 14 years when prosecuted by indictment. As noted in Friesen at paras. 99-100, these amendments reflect Parliament's determination that sentences be increased for sexual offences against children.

IV. Circumstances of the Offender

- [17] At the time of sentencing the respondent was 37 years old. He is a member of the Squamish First Nation.
- [18] The sentencing judge had before him a Gladue report, a psychological assessment prepared by Dr. Kropp, a forensic psychologist, and a letter authored by the respondent's employer attesting to his dependability. Dr. Kropp was also called by the Crown to give evidence at the sentencing proceeding.
- [19] The disadvantaged circumstances in which the respondent was raised, and the struggles he has experienced as an adult in attempting to overcome challenges rooted in childhood deprivation, neglect and trauma, were summarized by the judge:
- [7] [The respondent's] mother and grandmother were subjected to the exigencies of the residential school program. Both are reported to have experienced physical, sexual, and other abuses while attending the residential schools.

- [8] The accused was raised by his mother, who was described as having been a violent and mean alcoholic who suffered from mental health issues. The accused experienced violence, verbal abuse, and neglect at his mother's hands. The accused witnessed several suicide attempts by his mother.
- [9] At times during his formative years, the accused was placed in group foster homes where he remembers experiencing neglect, crying for food, being screamed at, and locked in his room for extended periods. He also reported being sexually abused by an older girl who was staying at the home.
- [10] The accused's mother committed suicide in 2002. His grandmother died in 2010. Both deaths were traumatic for the accused. He consumed a great deal of alcohol in an attempt to cope with his mother's death. Members of his aboriginal community have been cruel to him and he has been in several fights with them.
- [11] The accused believes that he has fetal alcohol spectrum disorder ("FASD") and that he suffers from anxiety and depression. He has never been assessed for FASD and none of these conditions [have been] formally diagnosed.
- [20] Many of the systemic and background factors that have affected Indigenous people in Canada are evident in the respondent's circumstances, including loss of family, community, language and culture, incomplete education, substance abuse, underemployment and low income, abandonment and mental, emotional and physical abuse. The respondent has a Grade 11 education. He told the author of the Gladue report that he is a binge drinker who is being treated for depression.
- [21] When he was in his early twenties, the respondent entered into a long-term common-law relationship with the victim's mother. The union produced five children. The respondent was a stay-at-home father who looked after the children, including the victim, his common-law partner's child from a previous relationship.
- [22] Significantly, this is not the respondent's first sexual offence against a child. On April 23, 2014, he pleaded guilty to one count of sexual interference. The offence occurred in 2012 when the respondent was 29. The victim of the offence was the respondent's 14-year-old step-niece. This offence also comprised more than one incident. The respondent touched the victim's breasts and vagina on one occasion. On a second occasion, he kissed her, touched her breasts, digitally penetrated her vagina and forced her to masturbate him to ejaculation. The respondent was unable to remember whether alcohol played a role in the commission of the offence in 2012.
- [23] The respondent received one day in jail for this offence, having served 201 days in presentence custody, for which he was credited the equivalent of 300 days. The sentence imposed was, in effect, a 10-month prison term. A three-year probation order was also imposed on a variety of terms, including that the respondent: (1) not be found in the company of any person known, or reasonably appearing, to be under the age of 16 years,

except for his own children; and (2) attend, participate in and complete counselling, including counselling offered through the Vancouver Forensic Sex Offender Treatment Program, if directed to do so by his probation officer. Finally, an order was made pursuant to s. 161(1)(a) and (b) of the Code prohibiting the respondent: (1) from attending a public park, public swimming area, daycare centre, school ground, playground or community centre where persons under the age of 16 years are present or can reasonably be expected to be present; and (2) from seeking, obtaining or continuing any employment or serving as a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 16 years. This order was made for a 10-year period. It expires on April 23, 2024.

- [24] The respondent breached the counselling condition of the probation order by failing to attend for appointments as directed by his probation officer. He did not attend a substance abuse program to which he was referred. He was referred to the Forensic Sex Offender Program on four occasions. On each of these occasions, the respondent failed to complete the program due to non-attendance. He was convicted of one count of breach of probation and sentenced on July 18, 2017, to a suspended sentence and a further 18-month probation order.
- [25] The offence in the case at bar was committed while the respondent was on probation for his first conviction for sexual interference. It occurred in 2016 when the victim's mother permitted the respondent to have unsupervised access to the children.
- [26] The respondent entered into a new relationship after the commission of this offence. He has a two-year-old daughter with his current partner.
- [27] At the time of sentencing, the respondent was employed full-time by a construction company. He was reported to be a trustworthy employee who would have work available to him in the future. I note that the respondent told the author of the presentence report that his employer was aware that he was before the court, but was not aware of the circumstances of the offence.
- [28] In his psychological report, Dr. Kropp concluded that the respondent was at "relatively high risk" to commit another sexual offence. In support of this conclusion, Dr. Kropp noted that the respondent was a repeat sexual offender who had failed to seize previous opportunities to engage in sex offender treatment. He assessed the respondent as having little insight into his motivation for sexually offending against children or his risk factors. The respondent was also noted to have a long-standing problem with alcohol abuse, which played a role in the commission of this offence. Dr. Kropp concluded that the most likely recidivistic scenario would involve the respondent reoffending opportunistically against a vulnerable young female in his care, or against a young female with whom he was in a position of trust. Dr. Kropp concluded that "[r]isk management in this case must involve [the respondent] attending and completing sex offender treatment, either in-custody or in the community." Dr. Kropp recommended that the respondent be made subject to a condition prohibiting

him from having unsupervised access to children or adolescents. He also cautioned that completion of a treatment program by a sex offender does not necessarily reduce the risk of re-offence.

- [29] Dr. Kropp was unable, on the information before him, to offer a diagnostic opinion about the presence of a pedophilic disorder. In his evidence on sentencing, he did, however, emphasize that sexually offending against two children is "rare behaviour" which reflects an emerging "behavioural choice".
- [30] The respondent advised the author of the presentence report that he quit drinking "cold turkey" and that he has been sober since mid-January 2017. In the event a community supervision order was made as part of the disposition, the probation officer also recommended the imposition of a condition requiring the respondent to participate in and complete counselling relating to alcohol abuse and sexual offence prevention. In addition, the probation officer recommended that the respondent not be alone in the presence of any person known to be or reasonably appearing to be under the age of 16 years.
- [31] In addressing the judge before sentence was imposed, the respondent reiterated his remorse and said he "hated" himself. He also said that he wanted and needed help.

V. Positions of the Parties on Sentencing

- [32] The Crown sought a sentence of imprisonment of two years less one day followed by a two-year probation order.
- [33] The respondent advocated for a suspended sentence and three years' probation.

VI. Reasons for Sentence

- [34] While the sentencing judge acknowledged that the respondent's insight into his behaviour was limited, he accepted that the respondent's expressions of remorse and desire for help were genuine.
- [35] The judge found the respondent's moral culpability to be high and the harm he caused to the victim to be profound. Although he did not specifically mention s. 718.01 of the Code (directing sentencing judges to give primary consideration to denunciation and deterrence for offences that involve the abuse of a person under the age of 18 years), he acknowledged the primacy of the sentencing objectives of denunciation and deterrence in cases of this kind. He concluded that suspended sentences will rarely be appropriate in a case involving the sexual assault of a vulnerable child by a person in a position of trust or authority. He concluded that the respondent's disadvantaged upbringing, together with his alcohol abuse, were major contributing factors to the commission of the offence.
- [36] The judge rejected Dr. Kropp's evidence that the respondent represents a serious risk to reoffend by sexually abusing children.

- [37] The judge concluded that, provided the respondent was able to complete the prerequisites for intake into an Aboriginal restorative justice program and participate in such a program, both the respondent and the community would be better off than if a sentence of imprisonment was imposed. He noted that a restorative justice facility on Vancouver Island offered a five-week residential substance abuse treatment program that was grounded in Indigenous culture and traditions. The program assists residents in understanding and coping with the effects of intergenerational trauma. The judge recognized that in order to qualify for this program, the respondent would have to be living in the community and be alcohol and drug free for at least six months. In addition, to be accepted into the program, the respondent would have to complete a sex offender program as well as six individual counselling sessions. The judge was confident that the respondent was motivated to meet the prerequisites for admission to the restorative justice facility on Vancouver Island.
- [38] In light of the respondent's exceptional personal circumstances, the judge concluded that this was one of the rare cases in which a suspended sentence was warranted.
- [39] The judge placed the respondent on probation for three years. In addition to the statutory terms, the respondent was prohibited from contacting his non-biological children. He was required to "work with [his] probation officer to take the steps necessary to complete the prerequisites for attendance at the [residential substance abuse program on Vancouver Island]". Once the prerequisites were completed, the respondent was directed to attend that program as soon as his participation could be accommodated.
- [40] The judge did not impose the additional community protection terms recommended by Dr. Kropp and the author of the presentence report.
- [41] The judge also declined to make an order pursuant to s. 161, noting that such an order is discretionary "and applies only to offenders who constitute a danger to children." He said this:
- [70] With the exception of the prohibition that I have already put in place regarding the accused's non-biological children, I am not persuaded that he poses a risk to children generally or that a broad-ranging s. 161 order is necessary in this case.

[Emphasis added.]

VII. Analysis

- [42] The Crown submits first that the judge erred in principle by concluding that the existence of exceptional circumstances justifies a departure from the proportionality principle set out in s. 718.1 of the Code. Proportionality, the fundamental principle of sentencing, requires a sentence to be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [43] The Crown submits that while exceptional circumstances may operate to attenuate moral culpability, they cannot justify the imposition of a sentence that fails to reflect the moral culpability of an offender.
- [44] Second, the Crown submits that the sentence imposed reflects a clearly unreasonable balancing of the relevant sentencing principles and is, thus, the product of an error in principle. Specifically, the Crown submits that the judge's focus on the sympathetic personal circumstances of the respondent and desire to facilitate his rehabilitation led him to impose a sentence that fails to reflect the predominant sentencing goals in this case--general deterrence, denunciation, and the protection of children from a repeat offender.
- [45] Third, the Crown says the judge's conclusion that the respondent poses no risk to children is speculative and unsupported by the evidence, and that it reflects palpable and overriding error.
- [46] The Crown submits that these three errors had a material impact on the sentence imposed and that, as a consequence, the deferential standard of review governing appeals from sentence does not apply. In these circumstances, the Crown argues that this Court's obligation is to perform its own sentencing analysis to determine a fit sentence: *Lacasse* at paras. 43, 61; *Friesen* at para. 27.
- [47] In the alternative, the Crown submits that the sentence imposed is demonstrably unfit. The Crown argues that the sentence is entirely out of step with sentences imposed in like cases and is unjustified by the respondent's personal circumstances standing alone. The Crown says that the judge, in failing to make an order pursuant to s. 161 of the Code, exercised his discretion in a clearly unreasonable way. The Crown says that an order under s. 161 was required in this case to protect vulnerable children. The Crown submits that the sentence imposed puts the public at risk by allowing an untreated, repeat sexual offender to remain in the community without any meaningful protective conditions.
- [48] I will set out the standard of review governing sentence appeals before dealing, in turn, with each of the Crown's grounds of appeal.

A. Standard of Review

- [49] It is well established that a deferential standard of review applies on appeals from sentence. Appellate intervention is only justified when a sentencing judge has committed an error in principle that had an impact on the sentence or imposed a demonstrably unfit sentence: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 90; *Lacasse* at paras. 41, 44.

B. Exceptional Circumstances and the Proportionality Principle

- [50] Proportionality is the cardinal principle of sentencing: *Lacasse* at para. 12. All sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R. v. Proulx*, 2000 SCC 5 at para. 54; *Friesen* at para. 30.

- [51] Sentencing judges exercise a broad, case-specific discretion in determining the weight to be accorded to the sentencing principles set out in s. 718 and 718.2 of the Code. Sentencing judges also exercise a broad discretion in determining how those principles are best achieved in a particular case. But the resulting sentence must respect the fundamental principle of proportionality: *R. v. Nasogaluak*, 2010 SCC 6 at para. 40; *R. v. Ipeelee*, 2012 SCC 13 at para. 37.
- [52] Sentencing is, of course, an individualized process. Exceptional circumstances--often rooted in an offender's disadvantaged background--may inform the assessment of an offender's moral culpability. The moral culpability of a significantly disadvantaged offender may be attenuated in the face of circumstances a sentencing judge considers to be exceptional.
- [53] Of particular note in this case are the systemic and background factors that have played a role in bringing Indigenous persons like the respondent before criminal courts. These background circumstances may be found to attenuate an Indigenous offender's moral culpability, including in very serious cases like the one at bar. In addition, the applicable sentencing objectives may be achieved in different ways and through the adoption of different methods in the case of a disadvantaged Indigenous offender: *R. v. Gladue*, [1999] 1 S.C.R. 688; *Ipeelee* at paras. 59, 84-86.
- [54] Exceptional circumstances do not, however, oust the proportionality principle. They simply permit the taking into account of case-specific considerations that could conceivably justify departure from a conventional sentencing range in order to craft a proportionate sentence. As this Court noted in *R. v. Padda*, 2019 BCCA 351 at para. 36, characterizing an offender's circumstances as exceptional "is simply a shorthand means of identifying the kind of personal circumstances which justify going outside a conventional range in order to craft an appropriate individualised proportionate sentence."
- [55] In the case at bar, the sentencing judge considered the respondent's circumstances to be so exceptional as to justify the imposition of a sentence that represents a marked departure from the range of sentence that would ordinarily be imposed on a repeat offender for conduct of this kind. I take the judge's reference to exceptional circumstances to encompass the respondent's tragic upbringing, his expression of remorse for his behaviour, and the judge's conclusion that the respondent was motivated to seek assistance in addressing the root causes of his deviant behaviour.
- [56] That the judge considered these circumstances to justify departure from the proportionality principle is evident in this extract taken from his reasons for sentence:
- [30] In cases where there are no exceptional or unique circumstances, s. 718.1 of the Criminal Code stipulates that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R. v. L.M.*, 2008 SCC 31 at para. 22.

[57] The clear implication of the judge's reasons is that exceptional circumstances justify departure from the proportionality principle. In advancing this proposition, I am of the view that the judge erred in principle. Amicus does not suggest otherwise. Rather, he asserts that the judge simply misspoke in this passage and that, in light of the reasons as a whole, it is clear that the judge understood the centrality of the proportionality principle and the need to give effect to it in the imposition of sentence. I am unable to accept this submission. In my view, this error fundamentally tainted the judge's approach to sentencing and led to the imposition of a sentence that fails to reflect either the gravity of the offence or the respondent's moral culpability.

C. Unreasonable Exercise of Discretion in Weighing the Applicable Sentencing Principles

[58] The Court in Friesen (at para. 26) reiterated that the weighing or balancing of sentencing factors can give rise to an error in principle only if it can be shown that the trial judge exercised his or her discretion unreasonably: see also Lacasse at para. 49. This ground of appeal attracts a highly deferential standard of review: *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.) at para. 35; cited with approval in *Nasogaluak* at para. 46.

[59] The Crown's argument on this point effectively merges with its contention that the sentence is clearly unreasonable or demonstrably unfit. I do not, therefore, consider it necessary or helpful in this case to address the argument as an independent ground of appeal.

D. Palpable and Overriding Error in Assessing the Respondent's Risk

[60] Appellate courts must defer to the factual findings of a sentencing judge unless they are shown to be the product of palpable and overriding error or tainted by an error in principle. There are profound functional justifications for this stringent standard of review. Both the advantaged position of the sentencing judge and the interests of justice in finality support a highly deferential standard of review on factual findings: *Friesen* at para. 28; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 15-18.

[61] The judge rejected the evidence of Dr. Kropp that the respondent was "a serious risk to reoffend." (Emphasis added.) He was also unpersuaded that the respondent "poses a risk to children generally". (Emphasis added.)

[62] The Crown concedes that it may have been open to the sentencing judge to find that the respondent was not at serious risk to reoffend. First, the judge accepted that alcohol played a significant contributing role in the commission of this offence and that the respondent has since taken steps to come to grips with his addiction. Second, the judge accepted that the respondent was motivated to change and to accept treatment. In these circumstances, it was open to the judge to reject Dr. Kropp's opinion that the respondent was at serious risk of sexual reoffending against children and I am obliged to defer to his factual finding on this issue.

- [63] The Crown submits, however, that it was not open to the judge on the evidence before him to conclude that the respondent posed no risk of reoffending sexually against children.
- [64] I would not give effect to this ground of appeal. In my view, the Crown's argument misconceives what the judge, in fact, said on this point. I do not understand the judge to have concluded that the respondent posed no risk of future re-offence. Rather, he found that the respondent did not pose a risk to children generally. As I understand the judge's reasons, he assessed the respondent to be an opportunistic sexual offender who posed a risk of re-offence in a narrowly defined familial context.
- [65] There is evidence upon which the judge could conclude that the respondent does not pose a risk of re-offence generally, by which I understand him to mean that the respondent does not pose a general risk to children in the community at large. On this issue, Dr. Kropp testified that if the respondent reoffended, it would likely involve opportunistic, as opposed to predatory, behaviour involving a vulnerable young female in his care. As there is evidence to support the judge's finding on this issue, I see no basis upon which we could properly intervene.

E. Is the Suspended Sentence Demonstrably Unfit?

- [66] Quite apart from the demonstration of error in principle, I am of the view that the sentence imposed in this case is demonstrably unfit. I would have come to this conclusion without the guidance Friesen provides.
- [67] To summarize, the respondent has now been convicted of sexually exploiting two vulnerable children. On both occasions, the respondent was in a position of trust. Both offences involve repeated conduct. The victim in this case was just 11 years old when the offence was committed. While psychological harm is presumed in cases of this kind, it is clear that the respondent caused actual harm to his stepdaughter. Understandably, she was "devastated" by his conduct. The respondent has little insight into the factors that have motivated his deviant behaviour. He has demonstrated either an unwillingness or inability in the past to engage in sex offender treatment. The expert evidence and common sense suggest that he is a risk to reoffend in a familial context in circumstances where children are left alone in his care.
- [68] In addressing this ground of appeal, the Crown and amicus devoted much of their argument to the parity principle set out in s. 718.2(b) of the Code. The aspirational goal that lies at the root of the parity principle is this: the sentence imposed on an offender should be similar to sentences imposed on similarly situated offenders for similar offences committed in similar circumstances. The parties joined issue on whether a suspended sentence has ever been imposed in like circumstances.

- [69] The Crown submitted that it was not aware of a factually comparable case in which a suspended sentence had been imposed on an untreated offender, Indigenous or not, who was before the court on a second conviction for sexually abusing a victim under the age of 16 years while in a position of trust or authority.
- [70] Amicus disputed this assertion. He brought to our attention *R. v. Chen*, 2019 BCSC 1290, in support of a submission that a suspended sentence has been imposed in like circumstances in the past. Ms. Chen was convicted of sexual interference arising out of a sexual relationship she had with a 13-year-old boy. I do not, however, consider the circumstances in *Chen* to be akin to the circumstances in the case at bar. In *Chen*, the offender and the complainant were willing participants in the conduct. I do not suggest that the willing participation of a minor in an offence of this kind is a mitigating circumstance. Plainly, it is not: *Friesen* at paras. 148-150. I say only that an aggravating circumstance present in this case was absent in *Chen*. Further, Ms. Chen was not in a position of trust, nor did she have a previous conviction for a similar offence. Finally, while harm is presumed in cases of this kind, there was no evidence that the complainant in *Chen* experienced the same degree of harm as the victim did in this case.
- [71] In my view, the unavoidable conclusion to be drawn from the jurisprudence put before us is that the sentence imposed in this case is a marked departure from sentences imposed in like circumstances. What flows from this?
- [72] I begin by recognizing that care must be taken not to justify appellate intervention through inflexible application of the parity principle. Departure from the conventional range of sentence is not an error in principle nor does it necessarily mean that the sentence imposed is demonstrably unfit: *Lacasse* at para. 58; *Friesen* at para. 37. It has repeatedly been said that ranges do not impose "hard and fast rules". A judge can impose a sentence outside the usually applicable range, including in response to exceptional circumstances, so long as the sentence gives effect to the proportionality principle and is in accordance with the other principles and objectives of sentencing applicable to the case: *Nasogaluak* at para. 44.
- [73] Second, I acknowledge that the sentencing judge was required under s. 718.2(e) of the Code to give individualized consideration to the respondent's moral culpability, including his status as an Indigenous offender who has been disadvantaged by the systemic factors addressed in the Gladue report. For the respondent, those disadvantages have been significant and, in many ways, devastating. In *Ipeelee*, the Court warned sentencing judges to guard against adopting a formalistic approach to parity in sentencing because doing so risks undermining the remedial purpose of s. 718.2(e). As noted in that case, "[u]niformity hides inequity": T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in Richard Gosse, James Youngblood Henderson and Roger Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) at 269; cited in *Ipeelee* at para. 79.

[74] With these cautionary notes in mind, parity in sentencing is a principle of general application with important links to the fundamental principle of proportionality. As Justice Wagner (now C.J.C.) observed in *Lacasse* at para. 53:

Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the Criminal Code.

[75] The Chief Justice returned to this theme in *Friesen* at para. 32, noting that "parity is an expression of proportionality."

[76] In my view, and taking into account the admonition in *Ipeelee*, the suspended sentence imposed in this case does not reconcile in a principled way the circumstances of the respondent with the parity principle which, in turn, informs what a proportional sentence would be: *R. v. Burnett*, 2017 MBCA 122 at para. 28.

[77] Further, with the remedial purpose of s. 718.2(e) and the respondent's background in mind, the judge was obliged to impose a sentence that gave effect to the proportionality principle. Sentences that unreasonably depart from the proportionality principle are, by definition, unfit: *Lacasse* at para. 53.

[78] In my view, the sentence imposed in this case is demonstrably unfit. It reflects a "clearly unreasonable" assessment of the respondent's elevated moral culpability.

[79] In addition, although I agree with the submission of amicus that the sentencing judge expressed awareness of the need to give primary consideration to deterrence and denunciation in a case of this kind, I am of the view that the sentence actually imposed gives virtually no weight to these principles.

[80] In short, the sentence imposed does not reflect the gravity of the offence or the respondent's moral culpability.

[81] Further, the sentence does not balance the respondent's sympathetic circumstances with the other applicable sentencing objectives and principles, including the fact that the respondent sexually abused a very young girl (s. 718.01), did so while he was in a position of trust or authority in relation to her (s. 718.2(a)(iii)), caused significant psychological harm (s. 718.2(a)(iii.1)), and is a repeat and untreated offender with little insight into what motivates his criminal behaviour.

[82] Without interfering with the judge's identification of the exceptional circumstances at play in this case, it is my view that a substantial sentence of imprisonment was required. Additionally, if a probation order was to be made as part of the disposition, it required, as a matter of public protection, the imposition of terms that shelter other children from the risk of sexual abuse. In my view, the probation order imposed by the judge fails to accomplish this end.

F. Should an Order Be Made Under Section 161 of the Code?

[83] The Crown argues that this Court should make the order under s. 161 of the Code that the sentencing judge declined to make. Amicus submits the judge declined to make an order under s. 161 as a consequence of his finding that the respondent did not represent a generalized risk to children. He submits that this factual finding is owed deference and that this Court should not interfere with the manner in which the judge exercised his discretion on this issue. In the alternative, amicus submits that the order should be limited to s. 161(1)(c)--that it only prohibit the respondent's contact with persons under the age of 16 years, and that exceptions be permitted for specific individuals, presumably the respondent's biological children.

[84] Some additional context is required to frame this ground of appeal.

[85] As noted earlier, the respondent is already bound by an order made under ss. 161(1)(a) and (b). That order does not expire until 2024. It prohibits the respondent from attending public parks and other places where children under the age of 16 can reasonably be expected to be present, and from obtaining or continuing in any employment or volunteering in a capacity that involves him being in a position of trust or authority towards a person under 16 years of age.

[86] Further, in light of my conclusion that additional terms of probation are necessary and should be imposed, the goal of public protection can be achieved, to some extent, by varying the conditions of the probation order. A probation order cannot, however, last more than three years.

[87] With this background in mind, I turn to briefly consider s. 161 and the manner in which the judge exercised his discretion in this case.

[88] Section 161 vests sentencing judges with the discretion to craft carefully tailored protection orders in circumstances where a sexual offender poses a risk to children and reasonable terms are needed to minimize that risk: *R. v. K.R.J.*, 2016 SCC 31 at paras. 46-48. Decisions about whether to make such an order are subject to the same deferential standard of review applicable on appeals from sentence: *R. v. L.M.R.*, 2010 ABCA 286 at para. 11.

[89] In the case at bar, the judge declined to make such an order after finding that the respondent posed no general risk to children. For the reasons given, I would not interfere with this factual finding.

- [90] At the same time, the judge did not find that the respondent posed no risk of sexually reoffending against children and, as I have said, common sense suggests otherwise. Indeed, implicit in the judge's decision is acceptance of the proposition that the respondent poses some risk of sexual re-offence against children. Were it otherwise, the judge would not have directed the respondent to complete a sex offender treatment program, nor would he have made a no-contact order in relation to the respondent's non-biological children.
- [91] That the respondent poses a risk of sexually offending against children in the future is also apparent from the evidence he gave at trial. During his evidence in chief, the respondent denied that each of the incidents occurred and stated that he has "no sexual feelings towards [his] children": *R. v. L.S.N.*, 2018 BCSC 2538 at para. 23 ("Reasons for Judgment"). On cross-examination, however, when challenged about his previous offence, he testified that "he does not have the same sexual feelings towards his own children": *Reasons for Judgment* at para. 25 (emphasis added.)
- [92] The respondent's evidence is incapable of supporting a conclusion that he poses no risk to children. To the contrary, it supports a conclusion that the respondent does have a deviant sexual interest in children. Further, the respondent's evidence raises concerns about the risk he poses to his biological children and step-children. Although he disclaimed any sexual interest in his own children, by offending against the victim in this case he violated the sexual integrity of a person he considered to be his own child.
- [93] Against this background, it is my view that the justification the judge gave for not imposing at least some of the protective conditions available under s. 161--that the respondent is not a general risk to children--reflects an unreasonable exercise of his discretion. The respondent is a risk to children left in his care and the sentence as a whole fails to respond to this reality.

VIII. Disposition

- [94] Having concluded that the reasons for sentence reflect an error in principle and that the sentence imposed is demonstrably unfit, it falls to this Court to substitute for the sentence imposed the sentence it considers to be fit and appropriate.
- [95] Section 718.2(e) provides that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders". The subsection does not require sentence reductions for Indigenous offenders in all circumstances. But the provision is a remedial one designed to ameliorate the serious problem of overrepresentation of Indigenous offenders in Canadian prisons. It obliges sentencing judges to take account of systemic and background factors that bear on an offender's moral blameworthiness and give serious consideration in every case to whether the applicable principles of sentencing can be achieved other than through reliance on incarceration.

[96] The sentence proposed by the Crown in the court below and sought on appeal is at the bottom end of the appropriate range. Even without the direction Friesen provides, the sentence could be much higher. But having regard to the Crown's position, the respondent's devastating background circumstances which shape, to some extent, the assessment of his moral culpability, the exceptional circumstances identified by the sentencing judge, the amount of time that has passed since the offence was committed and the Gladue considerations present in this case, I consider it appropriate to impose a sentence of imprisonment of two years less one day. I emphasize that this sentence is responsive to the particular factual findings made by the judge in this case and to the unique circumstances of this Indigenous offender. The sentence I propose also permits maintenance of the three-year probation order and control over the respondent, while in custody or on community supervision, for a period of five years. For these reasons, and having regard to the direction given in Friesen, the sentence I propose is unlikely to be of precedential value in future cases. I would credit the respondent for 15 days for time spent in presentence custody.

[97] In addition, I would add to the probation order imposed by the sentencing judge the following protective condition:

Condition 11: You must not be alone in the presence of any person you know to be or who reasonably appears to be under the age of 16, unless in the immediate and continuous presence of another adult over the age of 18 who is aware of this order and has been approved of in advance by your probation officer or the Court.

[98] I turn next to the question of the order that should be made under s. 161 of the Code.

[99] On the evidence before the sentencing judge, the respondent is not a predatory sexual offender and Dr. Kropp did not suggest otherwise. In my view, it is unnecessary in this case to make an order under s. 161 prohibiting the respondent from attending such places as public parks. Further, it is entirely unrealistic to suppose that the respondent will be employed in a position that involves him being in a position of trust or authority towards a person under 16 years of age. As the respondent is not a predatory offender, it is also unreasonable to suppose that he will seek out employment or volunteer for positions that place him in a position of trust or authority over children. His pattern of offending behaviour appears to be opportunistic, fuelled by alcohol, and confined to children left in his care.

[100] To guard against the risk of re-offence in this particular context, I would impose an order under s. 161(1)(c) prohibiting the respondent from being alone in the presence of any person he knows to be or who reasonably appears to be under the age of 16 years, unless he is in the immediate and continuous presence of someone over the age of 18 who is aware of the existence of this order. I would impose this order for a period of 10 years. It is, of course, subject to variation on application made pursuant to s. 161(3) of the Code.

[101] By way of summary, I would grant leave to appeal, allow the appeal, set aside the suspended sentence and impose a term of imprisonment of two years less one day. The respondent will be credited with 15 days for time spent in presentence custody. I would maintain the three-year probation order but add the protective condition set out in paragraph 97. I would also impose an order pursuant to s. 161(1)(c) for 10 years on the terms set out in paragraph 100.

[102] Finally, I would direct that a Warrant for Committal issue and that this be reflected in the order of the Court.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Harris"

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