

CANADA / JUDGMENT

R. v. McLeod

2025 BCCA 364

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 364 R. v. McLeod

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. McLeod,

2025 BCCA 364

Date: 20251024

Docket: CA49784

Between:

Rex

Respondent

And

Joseph Scott William McLeod

Appellant

Before:

The Honourable Mr. Justice Willcock

The Honourable Justice Donegan

The Honourable Justice Warren

On appeal from: An order of the Provincial Court of British Columbia, dated
February 28, 2024 (SOIRA order) (R. v. McLeod, North Vancouver Docket 69051-1).

Counsel for the Appellant:

S. Wright

Counsel for the Respondent:

M. Mereigh

E. Aston, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

May 13, 2025

Place and Date of Judgment:

Vancouver, British Columbia

October 24, 2025

Written Reasons by:

The Honourable Justice Donegan

Concurred in by:

The Honourable Mr. Justice Willcock

The Honorable Justice Warren

Summary:

The appellant was sentenced to 12 months' imprisonment and two years' probation for possession of child pornography, contrary to s. 163.1(4) of the Criminal Code. He was also ordered to comply with the requirements of the Sex Offender Information Registration Act, S.C. 2004, c. 10 ("SOIRA") for 20 years. He appeals from the SOIRA order, contending the judge made multiple errors in principle in refusing to grant him an exception.

Held: Appeal dismissed. The SOIRA order in this case was presumptive. It was for the appellant to displace that presumption and establish the applicability of either exception under s. 490.012(3) of the Criminal Code. The judge did not err in concluding he failed to do so. The judge engaged in the required contextual and individual analysis, conducted it through the correct presumptive lens, and was guided by the required statutory and other relevant factors. There is no basis for appellate intervention in this case.

Reasons for Judgment of the Honourable Justice Donegan:

Introduction

- [1] The appellant pleaded guilty to possession of child pornography between June 27, 2020 and January 7, 2021, contrary to s. 163.1(4) of the Criminal Code, R.S.C. 1985, c. C-46. A Provincial Court judge sentenced him to 12 months' imprisonment, followed by two years' probation. The judge also made an order, dismissing his application for an exception, requiring the appellant to comply with the requirements of the Sex Offender Information Registration Act, S.C. 2004, c. 10 ("SOIRA"), pursuant to s. 490.012(3) of the Criminal Code, for a period of 20 years (the "SOIRA Order").
- [2] The appellant appeals from the SOIRA Order. He contends the judge made multiple errors in principle in making the order and seeks to have it quashed. For the reasons that follow, I conclude the judge made none of the errors alleged, and I would dismiss the appeal.

The Offence

- [3] The judge summarized the events underlying the appellant's conviction in her reasons for sentence, *R. v. McLeod* (1 December 2023), North Vancouver 69051-1 (B.C.P.C.) (the "Sentencing Reasons") at paras. 12-22, and then again in her reasons for imposing the SOIRA Order, *R. v. McLeod* (28 February 2024), North Vancouver 69051-1 (B.C.P.C.) (the "SOIRA Order Reasons") at paras. 19-22. In brief, the appellant's offending was discovered after a social media company, Snapchat, reported to authorities the distribution of one image of child pornography and three images depicting child nudity on June 27, 2020 over its platform. Subsequent investigation led police to connect this distribution to the appellant and, in early January 2021, to execute a search warrant at his home where they seized the appellant's cell phone, laptop, and a portable external hard drive.
- [4] From the appellant's cell phone, police retrieved 66 images and one video recording of child pornography. Of the images, 29 were human-like cartoon images, and 37 were photographs of actual children. From his laptop, police located another 60 photographs of child pornography. Despite months of effort (and billions of password attempts), encryption and password protection prevented a search of the data contained in the hard drive.
- [5] In this case, the appellant was convicted of an offence in the Criminal Code using the terminology of "child pornography". Where required for context, I will use this statutory language, but elsewhere in these reasons I choose to use the phrase "child sexual abuse material" instead, as this terminology more accurately describes the images and video recording possessed by the appellant: see *R. v. Laplante*, 2022 NWTSC 9 at paras. 6-7; *R. v. S.J.H.*, 2024 BCCA 134 at para. 8; *R. v. Isbister*, 2025 BCCA 185 at para. 3.
- [6] All of the child sexual abuse material possessed by the appellant involved young male children, ranging in age from six months to 12 years old. Of the 126 images, 39 involved erotic posing of the children with no sexual activity; 15 involved sexual activity between children or solo masturbation by a child; 28 showed non-penetrative sexual assaults by adults upon children; and 44 showed penetrative sexual assaults by adults upon children.

The image distributed by the appellant that prompted the investigation and ultimately led to the appellant's arrest and conviction was a cartoon drawing involving, among other things, the sexual bondage of a young male child. The video recording located on the appellant's cell phone is approximately five minutes in duration. It is appropriately described as recording sadistic sexual abuse of an infant.

- [7] The appellant was arrested on January 7, 2021 and released on bail. He pleaded guilty to possession of child pornography on August 3, 2022. The sentencing hearing was adjourned for the preparation of various reports.

Sentencing Proceedings

- [8] The sentencing hearing was held on September 15, 2023. Emphasizing the objectives of denunciation and deterrence, the gravity of the offence, and the appellant's high moral culpability, the Crown sought a sentence of six to 12 months' imprisonment, followed by a two-year probation order, along with a number of ancillary orders, including a SOIRA order. The appellant, focusing on the objective of rehabilitation and various mitigating factors, advocated for a conditional sentence order of 24 months or, alternatively, imprisonment of four to six months, followed by a one-year probationary period. While he opposed one of the ancillary orders sought by the Crown, he made no submissions regarding the imposition of a SOIRA order.

Sentencing Reasons

- [9] The judge delivered the Sentencing Reasons on December 1, 2023, sentencing the appellant to a 12-month jail term followed by two years' probation. The probationary terms included provisions prohibiting him from coming into contact with children and requiring him to complete counselling for sexual offence prevention. Among other orders, the judge also imposed an order requiring the appellant to provide a sample of his bodily substances for inclusion in the National DNA databank, pursuant to s. 487.051(1) of the Criminal Code, and an order, pursuant to s. 161 of the Criminal Code, prohibiting him in various ways from communicating and coming into contact with young persons for a period of five years. At counsel's request, the judge adjourned the matter of a SOIRA order to another date to allow counsel an opportunity to make submissions on the amended statutory scheme that had come into force while the judge's decision was under reserve.
- [10] The judge began the Sentencing Reasons by outlining the circumstances of the offence, as I have described above. She turned next to the appellant's circumstances, deriving her findings from a large body of evidence, including a pre-sentence report prepared by a probation officer and reports prepared by forensic psychologists, Dr. Lisa Brown and Dr. Matthew Burnett.

- [11] The appellant was 38 at the time of his offending and 41 at the time of sentencing. He had no prior criminal record and had obeyed the terms of his release order. He generally had a good upbringing and does not suffer from mental illness or any drug or alcohol use disorders. He is intelligent and well-educated. The judge noted that at the time of the offence, the appellant had good social and family supports, secure employment and financial stability. He had been working as a guidance counsellor at a secondary school for four years at the time of his arrest. He lost his job. Prior to this, he had been employed, for 12 years, at another public high school as a math teacher.
- [12] The appellant is in a long-term relationship. In May 2021, he and his partner moved from British Columbia to Ontario for reasons related to his partner's employment. The appellant continued to be unemployed at the time of sentencing and was financially supported by his partner. He had recently commenced counselling and reported that he was abstaining from pornography use.
- [13] The appellant discussed his offending with the report writers. The judge noted several features of the appellant's admissions related to his offending, including that he: (a) had expressed remorse and an understanding that his conduct was harmful (Sentencing Reasons at para. 36); (b) acknowledged his sexual attraction to children as young as eight years old (Sentencing Reasons at para. 27); (c) expressed a "social" component to accessing child sexual abuse material, reporting that discovering others with similar interests caused him to "feel less stigmatized, less alone, and more connected" (Sentencing Reasons at para. 32); and (d) claimed that he tried to seek out material that was "self produced" (i.e., made by the children themselves) (Sentencing Reasons at para. 27). On this last point, the judge found the appellant's claim "difficult to reconcile" with his possession of "44 images of children being violently sexually penetrated": Sentencing Reasons at para. 27.
- [14] The judge next considered the content of the two expert reports. Both doctors noted the appellant was "candid" about his pedophilic interest in male children ranging in age from "about eight to 11 years old". Dr. Brown assessed the appellant with a "relatively low risk" to re-offend. She further opined that if left untreated, the appellant might access child pornography but did not see it likely the appellant would commit a "contact offence" against a stranger. Dr. Burnett assessed the appellant as having a low risk to re-offend sexually and opined that if he were to re-offend, it would likely be Internet child pornography and unlikely to be a "contact offence".
- [15] The judge identified certain weaknesses in the opinions of both experts, particularly their opinions on sexual recidivism risk. She was concerned the information they had been provided about the nature of the images was incomplete. She noted that neither expert referred to having reviewed the agreed statement of facts and their descriptions of the offence did not refer to some of its more aggravating features--the distribution of the image of a "distressed, harmed, gagged, and bound child in June of 2020" and the "five-minute video possessed by Mr. McLeod on his cell phone depicting the repeated intrusive sexual assault of an infant": Sentencing Reasons at paras. 28, 30.

- [16] The judge was also troubled by Dr. Brown's failure to explain how she concluded the appellant was a "relatively low" risk to re-offend, in light of the five factors she had identified as associated to the appellant's risk for sexual re-offending, namely: (1) the appellant accessed child sexual abuse images repeatedly over an extended period of time; (2) he minimized the impact of his behaviour; (3) he had limited self-awareness in some areas; (4) he engaged in some less healthy coping behaviours, such as relying on substances to unwind; and (5) he has pedophilic sexual arousal: Sentencing Reasons at para. 29.
- [17] Dr. Burnett offered opinions on several matters. The judge accepted his principal diagnosis of pedophilic disorder (non-exclusive type, sexually attracted to males); his additional diagnosis of adjustment disorder, with mixed anxiety and depressed mood in relation to current legal circumstances; and his opinion that the appellant has a "past history of problematic alcohol use in response to significant emotional distress": Sentencing Reasons at para. 33.
- [18] However, as with Dr. Brown, the judge was concerned about Dr. Burnett's opinion on risk. The judge found the information the appellant provided Dr. Burnett was inconsistent with some of the child sexual abuse material possessed by the appellant. For example, in the Sentencing Reasons, the judge held:
- [27] In the pre-sentence report and the Burnett report, he is said to have acknowledged his attraction to children as young as eight years old. In the pre-sentence report, the writer states that Mr. McLeod reported that he, "tried to seek out content that appeared to be self produced". I understand this to mean child pornography made by children. Given that he possessed 44 images of children being violently sexually penetrated, this statement is difficult to reconcile with the objective evidence.
- [19] As another example, the judge noted the appellant reported to Dr. Burnett that although he possessed a "collection" of child sexual abuse material, including material depicting sexual bondage, he found such material to be "disturbing" and not arousing: Sentencing Reasons at para. 31. The judge found this self-report to be inconsistent with the appellant's offending conduct as well, stating in the Sentencing Reasons:
- [32] Dr. Burnett opines that, "it is not atypical for child pornography offenders to collect a broad array of child sexual exploitation material, not all of which reflects their particular sexual interest/arousal pattern." While that may be so, Mr. McLeod sending the image of the bound victimized child in June 2020 is difficult to reconcile with his self-reporting that he found such images, essentially, of little sexual interest on his part.
- [20] The judge reviewed the relevant law and then turned to her determination of a proportionate sentence. She found that both the gravity of the offence and the appellant's moral culpability were high: Sentencing Reasons at paras. 73-74. She found the following aggravating factors: the gravity of the child sexual abuse material; the incident of distribution in June 2020; and the offence involved the abuse of victims under the age of 18 years: Sentencing Reasons at para. 75. The judge found the following mitigating factors: the

appellant's guilty plea; lack of criminal record; compliance with terms of his release; supportive family and friends; participation in counseling; an indication of low risk to reoffend; and his genuine remorse: Sentencing Reasons at paras. 76-81. Balancing all of the above, the judge determined that a proportionate sentence was 12 months' imprisonment followed by two years' probation. The appellant does not appeal from sentence.

Additional SOIRA submissions

- [21] With the Sentencing Reasons in hand, counsel had several weeks to prepare for the further hearing they had requested regarding the making of a SOIRA order. The hearing was held on January 29, 2024. To provide the necessary context for their submissions, I will briefly summarize the history of the statutory scheme and the current scheme.
- [22] In 2004, Parliament first created the National Sex Offender Registry (the "Registry") by enacting SOIRA and amending the Criminal Code. The purpose of SOIRA at that time was "to help police services investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders.": SOIRA, s. 2(1) as it appeared on April 1, 2004.
- [23] SOIRA imposes a number of obligations upon sexual offenders. They are required to provide extensive personal information, including their date of birth, gender, height, weight, a description of their physical distinguishing marks, information relating to all driver's licences and passports, and the registration centre may take their photograph and record their hair and eye colour: SOIRA, ss. 5(1)(b), (g), (i), and (j), 5(3). They are also obliged to provide addresses for their principal and secondary residences, names and addresses for their places of employment, volunteer locations and educational institutions, details pertaining to vehicles they own or use regularly, and a contact phone number for each location where they can be reached and every mobile phone and pager in their possession: SOIRA, s. 5(1)(c), (d), (e), (f), and (h). SOIRA also imposes ongoing reporting requirements, which include that offenders must report annually, keep their information up to date, report their plans for any travel lasting seven or more consecutive days, and report any change to their home or employment address: SOIRA, ss. 4.1(1)(a), 4.1(1)(c), 6(1)(a). They are also subject to random police checks: SOIRA, s. 16(2)(b).
- [24] The 2004 legislative scheme was permissive. Prosecutors were required to apply for SOIRA orders, and judges retained discretion to exempt an offender from registration if an order would be "grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature": Criminal Code, s. 490.012(4) as it appeared on December 15, 2004.
- [25] Between 2004 and 2011, concerns arose about the Registry's low inclusion rate, with only about 50 percent of eligible offenders registered: *R. v. Ndhlovu*, 2022 SCC 38 at para. 70. This low inclusion rate was seen to be associated with prosecutorial and judicial discretion. Prosecutors may have overlooked making the applications or bargained them away in plea negotiations, and judicial discretion may have been "too commonly invoked, including on

concerning bases, such as myths and stereotypes about victims of sexual crimes and those who commit those crimes" (e.g., restricting the applicability of the legislation to sex offender stereotypes like the "predatory stranger": see Janine Benedet, "A Victim-Centred Evaluation of the Federal Sex Offender Registry" (2012) 37 Queen's L.J. 437; R. v. Eldon, 2025 ONCA 348 at para. 32).

- [26] In response to these concerns, Parliament amended the statutory scheme in 2011 by enacting the Protecting Victims from Sex Offenders Act, S.C. 2010, c. 17. Among other things, this legislation largely removed prosecutorial discretion in applying for an order and completely removed judicial discretion from the operation of s. 490.012, making SOIRA orders mandatory for all offenders found guilty of a designated offence. It also introduced a new provision (s. 490.013(2.1)) requiring mandatory lifetime registration for offenders who commit more than one designated sexual offence, "irrespective of the nature or timing of the offences and even if they are part of the same transaction": Ndhlovu at para. 3. The legislation also amended s. 2(1) of SOIRA by adding the objective of helping police prevent crimes of a sexual nature, not just investigate them.
- [27] A constitutional challenge was brought to the mandatory nature of this scheme, specifically to ss. 490.012 and 490.013(2.1) of the Criminal Code. In Ndhlovu, a majority of the Supreme Court found that s. 490.012 (which required mandatory registration of offenders convicted of a designated sexual offence) and s. 490.013(2.1) (which required mandatory lifetime registration of those who commit more than one designated sexual offence) were unconstitutional and declared them to be of no force and effect. In respect of s. 490.012, the Court suspended the declaration of invalidity for one year: Ndhlovu at para. 136.
- [28] The majority found the impugned provisions were overbroad and violated s. 7 of the Charter because they led to the registration of offenders who were not at an increased risk of committing a future sex offence: Ndhlovu at paras. 111, 115. Although the purposes of SOIRA--to help police prevent and investigate crimes of a sexual nature--were found to be "pressing and substantial", the challenged provisions were not saved by s. 1 of the Charter since they were not minimally impairing, and the deleterious effects of the provisions outweighed their salutary ones: Ndhlovu at paras. 128, 135.
- [29] In response to Ndhlovu, Parliament introduced amendments to the Criminal Code relating to SOIRA that came into effect in October 2023: An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act, S.C. 2023, c. 28. Under the new scheme, Parliament significantly narrowed the circumstances in which a SOIRA order is mandatory. For instance, s. 490.012(1) now requires a mandatory order where the offender is sentenced for a designated offence and three pre-conditions are met: a) the offender was prosecuted by indictment; b) the sentence for the designated offence is a term of imprisonment of two years or more; and c) the victim of the designated offence is under the age of 18 years. Although the appellant was convicted of a designated offence prosecuted by indictment with victims under the age of 18, his sentence of less than two years precluded the application of s. 490.012(1). Instead, his matter is governed by the

new ss. 490.012(3) and (4).

- [30] Under s. 490.012(3), if an offender convicted of a designated offence (such as possession of child pornography) is not caught by the mandatory order provisions set out in ss. 490.012(1) or (2), there is a presumption in favour of making a SOIRA order. This presumption can be displaced in only two circumstances--where the offender establishes either that:
- a) there would be no connection between making the order and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under that Act; or
 - b) the impact of the order on the person, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.
- [31] As Associate Chief Justice Fairburn recently observed in Eldon, it is critical that this statutory presumption be kept "front and centre" in the s. 490.012(3) analysis, recognizing that a SOIRA order shall be imposed unless the offender establishes one of the exceptions: Eldon at para. 52. This presumption accords with the acknowledgment by the majority in Ndhlovu that sexual offending is one of several "empirically validated predictors of increased sexual recidivism": Ndhlovu at para. 94. It also aligns with the recognition that the prevention and investigation of sexual offending, through the assistance of the Registry, is in the public interest: Eldon at para. 52.
- [32] The threshold for establishing each of the s. 490.012(3) exceptions is high--there must either be no connection between the making of the order and the purposes of SOIRA, or the order would be grossly disproportionate to the public interest in protecting society through the purposes of SOIRA: Eldon at para. 44.
- [33] Also new is s. 490.012(4), which sets out a list of factors that must inform those situations where an offender attempts to establish one of the exceptions applies. The list reads:

Factors

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

- (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
 - (f) the opinions of experts who have examined the person; and
 - (g) any other factors that the court considers relevant.
- [34] In terms of duration, pursuant to s. 490.013(2)(b), where an offender is convicted of an offence that is punishable by a maximum term of imprisonment of 10 or 14 years (as in the appellant's case), the SOIRA order ends 20 years after it is made. Section 490.015(1)(b) allows the offender to bring an application for termination after 10 years.
- [35] It was within this context and new legislative framework that counsel made their submissions. Neither party tendered any additional evidence at the hearing. The appellant sought to displace the presumptive order by establishing either of the s. 490.012(3) exceptions. The Crown took the position that the appellant failed to meet his burden and argued the enumerated factors in s. 490.012(4) all support the presumptive 20-year SOIRA order.
- [36] In respect of the "no connection" exception, the appellant's argument was twofold. First, he attempted to persuade the judge there was, generally, no nexus or connection between the making of the order and the purpose of helping police services investigate or prevent sexual crimes by requiring registration of an offender convicted of possession of child pornography. His second argument related more specifically to him and his offending. He emphasized those factors in s. 490.012(4) related to his low risk to re-offend, including the opinion of experts and features of his personal circumstances, and argued there is no causal connection between the gravity of the images in his possession and his likelihood to re-offend. He also asked the judge to consider that the terms of his probation and s. 161 orders were sufficient and undermined the need for a SOIRA order.
- [37] In seeking to establish the gross disproportionality exception, the appellant focused primarily on restrictions SOIRA would have upon his freedom of movement. He argued that SOIRA's requirements could potentially impede his ability to travel freely between his home in Ontario to British Columbia (where his parents reside) and his ability to seek employment opportunities that may require travel, which could undermine his rehabilitation.

SOIRA Order Reasons

- [38] The judge delivered her reasons for imposing the SOIRA Order on February 28, 2024. She began by correctly setting out the legislative framework, the positions of the parties, the presumptive lens through which she was to conduct her analysis, and the factors that were to inform it. In considering each of the s. 490.012(4) factors, the judge reiterated and/or expanded upon findings made in the Sentencing Reasons. She found:

- a) the offence was serious ("not close to being on the low end of the gravity spectrum"), as it involved a large portion of child sexual abuse material where real children, including infants and toddlers, were violently sexually assaulted: SOIRA Order Reasons at paras. 19-21;
 - b) the children in the images and recording were all vulnerable and exploited victims, ranged in age from six months to 12 years, and the harm to them was "palpable": SOIRA Order Reasons at para. 22;
 - c) as a consumer of child sexual abuse material, the nature of the appellant's relationship to the victims was exploitative, and the circumstances are such that he formed part of a community that directly harms child victims: SOIRA Order Reasons at para. 23;
 - d) the appellant, a first-time offender diagnosed with pedophilic disorder, lost his career due to his offending but maintains the support of friends and family. As a result of his connection to BC and Ontario, there is an absence of predictability about where he will reside: SOIRA Order Reasons at paras. 24-25;
 - e) the appellant has no prior criminal history: SOIRA Order Reasons at para. 26;
 - f) Dr. Burnett opined that the appellant's risk of sexual recidivism is expected to be low, and Dr. Brown identified the presence of five risk factors before offering the opinion that the appellant is a "relatively low risk to reoffend": SOIRA Order Reasons at paras. 27-28; and
 - g) the hard drive recovered during the search of the appellant's residence could not be accessed by police: SOIRA Order Reasons at para. 29.
- [39] The judge next considered the various authorities counsel had placed before her, distinguishing those relied upon by the appellant where SOIRA orders were not made. After weighing all of the factors, the judge found the appellant had not met his burden of establishing either exception. She summarized her conclusions as follows:
- [37] I have considered all of the factors set out in subsection (4) of 490.012. In my view, the facts here are most similar to those in Tarleton, and I am mindful of that court's conclusion at paragraphs 30/31. I have considered the experts' opinions here and, in my view, they are one of the factors that must be considered, and note that, unlike in Towler, there was no finding of very low risk, or negligible, but rather relatively low risk, and Dr. Burnett's language of "the probability that Mr. McLeod will reoffend sexually is expected to be low". This must be factored in with the other factors set out above.
- [38] Unlike the offender in Harroff, Mr. McLeod does have an expressed interest in young children. While his candour on this topic may be consistent with insight, I also note that there were some apparent inconsistencies in his self-reporting, such as saying he was not interested in bondage but that being the nature of the image he distributed in June 2020. The offending here occurred over a period of time, approximately a year. There is a level of sophistication and efforts at avoiding discovery, as evidenced in Exhibit 2 and the privacy settings, for lack of a better phrase.

- [39] I am not satisfied that Mr. McLeod has established that there would be no connection between making the order and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the Act.
- [40] As to the grossly disproportionate issue, I accept that the reporting has an impact on his privacy and liberty. However, given all of the factors discussed above, and having regard to his lack of stability, and by this I mean the recent move to Ontario, loss of career, and connection to both B.C. and Ontario, his movements and location are not predictable. In the circumstances, I am satisfied that the reporting requirement has a heightened practical value here. I am not satisfied that the impact would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature to be achieved by the registration.

On Appeal

- [40] Under s. 490.014 of the Criminal Code, both parties have the right to appeal from the granting or refusal of a SOIRA order pursuant to s. 490.012 on "any ground of appeal that raises a question of law or of mixed law and fact." In terms of remedy, an appeal court may either dismiss the appeal, allow it and order a new hearing, quash or amend the order, or make an order pursuant to s. 490.012.
- [41] As was recently explained in *R. v. Wiens*, 2025 BCCA 162, the standard of review on appeals from SOIRA orders is a highly deferential one. An appellate court will only intervene if it is shown there is an error in principle, failure to consider a relevant factor, an overemphasis of appropriate factors, or a clearly unreasonable decision: *Wiens* at paras. 49-58.
- [42] The appellant contends that the judge made three reversible errors in not providing him with an exception. He argues the judge erred in her analysis of the "no connection" exception: (1) through her failure to consider and identify a connection between making the order and the purposes of requiring registration; and (2) in her approach to the level of sexual recidivism risk that would support such an exception. In relation to her consideration of the "gross disproportionality" exception, he says the judge erred by: (3) considering his inter-provincial mobility as a factor weighing against the granting of an exception.
- [43] In response, the Crown argues the judge made none of the errors alleged and maintains that the judge correctly and reasonably found the appellant failed to meet his burden to displace presumptive SOIRA registration. As I will now explain, I agree with the position taken by the Crown.

Did the judge err by failing to consider and identify whether there is a connection between making the order and the purposes of requiring registration?

- [44] The appellant contends the judge erred by failing to engage in the analysis required under s. 490.012(3)(a). He says that although the judge considered the factors required by s. 490.012(4), her decision was merely conclusory. To determine that he failed to establish there was no connection between the making of the order and SOIRA's purposes in requiring registration, the judge was required to consider and specifically identify the connection. In other words, the appellant contends the s. 490.012(3)(a) analysis requires the judge to identify how his registration might help police investigate or prevent crimes of a sexual nature and her failure to do so constitutes an error in law.
- [45] The appellant further submits that had the judge engaged in this analysis, it would have been readily apparent that for his type of offence and recidivism risk (a "no-contact offence" involving child sexual abuse material obtained online), there is no role for registration to play in furtherance of SOIRA's purposes. He points to other types of designated offences, categorizing them as "contact offences with a stranger", where personal information gathered through registration (such as an offender's home or work address) plays a more obvious role in the investigation of sexual offences. He contrasts this with his offence--one that "can be committed by anyone" with a computer from "virtually anywhere in the world"--where, he asserts, knowledge of an offender's home or work address would not assist police investigations of similar offences. In oral argument, the appellant diluted this position slightly, suggesting that "no-contact offences" generally "trend away" from there being any connection between registration and SOIRA's purposes.
- [46] Respectfully, I do not agree. To accede to the appellant's position would require me to disregard the language of the statute and well-established principles of statutory interpretation which requires words of an Act to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837. An examination of the provisions of SOIRA and ss. 490.011 to 490.014 of the Criminal Code in this way does not support the appellant's submission.
- [47] SOIRA's stated purpose is to help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders: SOIRA, s. 2(1). To guide the accomplishment of that purpose, s. 2(2) sets out principles recognizing, among other things, that providing police with rapid access to certain reliable and current information relating to sex offenders advances the interest in protecting society through the effective prevention and investigation of crimes of a sexual nature. A crime is of a sexual nature if it consists of one or more acts that are either sexual in nature or committed with the intent to commit an act or acts that are sexual in nature, and if it constitutes an offence: SOIRA, s. 3(2).
- [48] The jurisprudence has long recognized that child pornography offences are violent crimes of a sexual nature. They, like all sexual crimes against children, involve the wrongful exploitation of children's vulnerability and cause profound, far reaching and ongoing harm to children, families and communities: for example, see *R. v. Friesen*, 2020 SCC 9 at para. 5;

R. v. Sharpe, 2001 SCC 2 at para. 28. The online distribution of, and access to, child sexual abuse materials has not only accelerated the proliferation of these crimes (see R. v. Morelli, 2010 SCC 8 at para. 114, Deschamps J. dissenting), it has fundamentally altered the nature or character of the harm caused to victims by repeating the original sexual violence, continually perpetuating the harm: Friesen at para. 48.

- [49] Consistent with this jurisprudence, Parliament chose to include child pornography offences in the list of those "primary" and "designated" offences to which SOIRA applies: Criminal Code, s. 490.011(1). By doing so, Parliament drew a clear connection between all of these enumerated offences and the purposes of SOIRA in requiring registration. As with other offenders found guilty of committing a designated offence not subject to a mandatory order, Parliament chose, through the language of s. 490.012(3), to subject an offender convicted of a child pornography offence like the appellant to a presumptive SOIRA order. In other words, the connection between making the order and the purposes of SOIRA in requiring registration is presumed.
- [50] Section 490.012(3)(a) places the onus on an offender to displace this presumption. Respectfully, the appellant's position would require the burden to be placed elsewhere, either on the Crown to call evidence to establish a connection between making the order and SOIRA's purposes in each case, or perhaps on the judge to somehow justify the existence of a connection by speculating on how police investigations and preventative measures work and how the offender's inclusion in the regime would help them. Either scenario is untenable and runs contrary to the unambiguous language of the provisions, read in light of the legislative scheme, the object of SOIRA, and the intention of Parliament. Had Parliament intended for the Crown to establish the existence of a connection, or for the court to justify or identify the existence of one on a case-by-case basis, it could have made that intention clear in the wording of the provision. Instead, Parliament has pronounced that the connection is presumed for prescribed offences.
- [51] The appellant's position is also reminiscent of arguments made during the 2004-2011 SOIRA era where some offenders relied on a "categorization" of sexual offences in support of arguments against registration. These arguments were premised on the notion that the offender was not the "type" the Registry was aimed at including. While such positions gained traction in some trial courts for a time (e.g., R. v. Have, 2005 ONCJ 27, which held that the aim of SOIRA was to help police in the investigation of "predatory stranger" crimes and those offenders who did not fit this model should be excepted from registration; R. v. S. (K.R.), 2007 ONCJ 174; Benedet at 449-451, 452-456), appellate courts soon rejected these arguments.
- [52] For example, in R. v. Redhead, 2006 ABCA 84, leave to appeal to SCC ref'd, [2006] S.C.C.A. No. 187, the Alberta Court of Appeal rejected the "predatory stranger" model on the basis that there is a presumed public interest in the registration of all offenders who commit the prescribed offences: Redhead at paras. 38, 42. Similarly, in R. v. B.T.Y, 2006 BCCA 331, this Court held that nothing in SOIRA's stated purpose or ss. 490.011 or 490.012 suggests that Parliament intended to limit registration only to "stranger predators": B.T.Y at para. 28. The

Ontario Court of Appeal took the same approach in *R. v. Debidin*, 2008 ONCA 868 and rejected the distinction of "predatory strangers" from other offenders caught by SOIRA's registration requirements: *Debidin* at para. 77.

- [53] The appellant's submission should be similarly rejected. At the heart of his position is the idea that SOIRA registration is aimed at those convicted of (or at risk of committing) "contact" rather than "no-contact" offences. As I have endeavoured to explain, nothing in SOIRA's stated purpose or within the statutory scheme suggests that Parliament intended to limit registration in this way. The scheme does not create categories of sexual offenders who commit (or are at risk of committing) a "contact" versus a "no-contact" offence. The sexual offences enumerated in s. 490.011 are varied and are not limited to "contact" offences. Had Parliament intended to limit the scope of SOIRA registration to offenders involved in, or at risk of committing, only "contact" sexual offences, it would have done so through express language to that effect.
- [54] The judge conducted her s. 490.012(3)(a) analysis through the correct presumptive lens. It is not for the Crown to prove the connection between making the order and SOIRA's purposes in requiring registration or for the judge to somehow justify the existence of that connection. It is for the appellant to displace the presumption by establishing there is no connection between making the order and the purposes of SOIRA in requiring his registration. I would not accede to this ground of appeal.

Did the judge err in her approach to the level of sexual recidivism risk that would support an exception?

- [55] The appellant alleges the judge erred in her consideration of risk by requiring him to establish "near zero risk" to re-offend to qualify for the "no connection" exception. In support, he highlights paragraph 37 of the SOIRA Order Reasons I have cited above.
- [56] The appellant contends this reasoning runs counter to the majority's guidance in *Ndhlovu* that registration for a small group of offenders--approximately 10 percent of offenders who have committed a sexual offence who are not, at the time of sentencing, at an enhanced risk of reoffending sexually when compared to the general criminal population--does not serve the provisions' purpose: *Ndhlovu* at paras. 95, 135. He contends that because experts assessed him as having low risk to re-offend, with the likelihood of any further offending limited to use of Internet child sexual abuse material, the judge ought to have determined that he fell within this small group of offenders. Instead, he says she erroneously drew an unhelpful comparison to *R. v. Tarleton*, 2023 ABCJ 274 and effectively imposed a standard of "near zero risk" to re-offend for him to meet his burden.
- [57] I respectfully disagree, for several reasons.

- [58] First, and fundamentally, the manner in which the appellant frames this question distorts the analysis under s. 490.012(3)(a). His position suggests that if an offender can establish they fall within a certain low range of recidivism risk, an exception from registration must follow. In other words, he seeks to elevate the assessment of recidivism risk from part of the circumstances that bear on the analysis to the actual test he is required to meet. This is not supported by the language of the statute.
- [59] It bears repeating that the previous provision (requiring mandatory registration of all sexual offenders committing a designated offence) failed, among other reasons, because it was overbroad, capturing those lowest risk sex offenders for whom there was no real possibility that including their information on the Registry would ever prove useful to police. Parliament responded with remedial legislation aimed at addressing those constitutional concerns. This response included the reinstatement of judicial discretion to provide exceptions to presumptive SOIRA registration in s. 490.012(3). Parliament chose to limit exceptions to cases where certain offenders could establish either there was no connection between the making of the order and SOIRA's purposes in requiring registration, or the impact of the order upon them would be grossly disproportionate to the public interest in the protection of society through SOIRA's purposes. Had Parliament intended, as the appellant's position suggests, that presumptive registration could be avoided where an offender establishes that he falls within a certain category of low-risk offenders, it would have done so through express language to that effect.
- [60] Parliament's response also included the intention that the judicial discretion engaged by s. 490.012(3) be guided by certain enumerated factors, set out in s. 490.012(4). Although not specifically identified as one of those factors, exception applications will invariably involve judicial assessment of an offender's risk to reoffend. Indeed, many of the enumerated factors may serve to inform such an assessment, depending on the case. Though a judge's assessment of an offender's risk to reoffend may often weigh heavily in the analysis, it is not the dispositive factor. Again, had Parliament intended for recidivism risk to be the only factor guiding the exercise of discretion, it would have done so through express language to that effect.
- [61] Second, the appellant's position erroneously presumes that one of the s. 490.012(4) factors, the opinions of experts, should be determinative. He argues that because experts assessed his risk to reoffend as low and likely limited to the use of Internet child sexual abuse material, the judge ought to have concluded his registration bore no connection to SOIRA's purposes.
- [62] The decision to except an offender from SOIRA registration involves a highly fact-sensitive exercise of discretion. It requires a careful balancing of relevant competing interests, informed by the mandatory factors enumerated in s. 490.012(4), as well as any number of other factors that may arise in the specific circumstances of the case: *Wiens* at para. 57. No one factor can be said to be determinative.

- [63] The judge engaged in the correct exercise. She was alive to her obligation to conduct a contextual and individual analysis, one that required her to balance the competing interests while carefully weighing all of the enumerated factors and any other relevant factors. She was clear that no one factor was determinative: SOIRA Order Reasons at para. 37. The judge was bound to consider the opinions of Drs. Brown and Burnett, and explicitly did so. However, the weight to be afforded those opinions was a matter of discretion. As I described earlier, the judge found the experts' opinions on recidivism risk suffered from certain foundational weaknesses, and it is clear she afforded them less weight as a result. It was open to her to do so, and I see no basis upon which to interfere with that assessment.
- [64] Third, it is implicit in the appellant's argument that the judge made a reversible error by failing to conclude that he fell within that "10 percent of individuals" who are not at an enhanced risk of reoffending when compared to the general criminal population, as discussed by the majority in *Ndhlovu*.
- [65] The judge made no such error. Neither expert offered this opinion. While Dr. Brown opined the appellant poses a "relatively low risk to reoffend", nothing in her report suggests a parallel with that small group of offenders identified in *Ndhlovu*. Indeed, despite her ultimate opinion, Dr. Brown identified certain risk factors and recommended as "prudent" that the appellant "not be allowed unsupervised contact with underage males". Similarly, while Dr. Burnett opined the probability the appellant will reoffend sexually is low, nothing in his report suggests that parallel either. As one component of his risk assessment, Dr. Burnett used two actuarial risk tools which involved a comparison of the appellant's risk to reoffend with other sexual offenders, but he did not compare his risk to that of non-sexual offenders. On the Child Pornography Offender Risk Tool (a scale developed specifically for use with child pornography offenders where an individual is rated as to the presence or absence of seven individual risk/need factors), Dr. Burnett assigned the appellant a score of "3", placing his risk to reoffend within the upper end of average relative to other child pornography offenders. On the Stable-2007 (a scale comprised of 13 individual items, each corresponding to a specific condition, problem, characteristic or other circumstance that contributes to the likelihood a person will reoffend), he assigned the appellant a score of "4", placing him at roughly the 27th percentile (mid-point average) relative to a sample of adult male sexual offenders. Finding the appellant's level of risk, as measured by both scales, to be "neither low nor high", Dr. Burnett concluded that he "appears to represent an average or typical child pornography offender".
- [66] In any event, the opinions of experts are but one factor to be considered on an exception application. Expert opinions related to risk to reoffend may inform the judicial assessment of an offender's risk, but the weight they are afforded is a matter of discretion. Nothing in the expert opinions in this case, or in any of the other factors considered by the judge relevant to her assessment of the appellant's recidivism risk, suggests his risk should have been equated with those offenders discussed by the majority in *Ndhlovu*.

- [67] Fourth, the appellant seeks to draw parallels between the circumstances of his case and the circumstances of other decisions where findings related to low levels of recidivism risk played pivotal roles in either granting exceptions under the new legislation, or in granting individual constitutional exemptions from SOIRA registration. He says that because his risk to reoffend is similar to those offenders, the judge ought to have reached the same conclusion. By denying the exception, she held him to a higher standard than those other offenders, requiring him to establish close to no risk to reoffend. In my view, no such parallels can be drawn.
- [68] *R. v. Shokouh*, 2023 ONSC 1848, one of the authorities relied upon by the appellant, pre-dates the legislative amendments and was decided during the suspension of s. 490.012's declaration of unconstitutionality. Like the offender in *Ndhlovu*, the offender in *Shokouh* sought a personal remedy under s. 24(1) of the Charter--an exemption from the suspension of the declaration of invalidity--on the basis that requiring him to register would violate his Charter rights. Not only was the legal framework governing the analysis different, the circumstances of this case are different as well.
- [69] Mr. *Shokouh* was a youthful, first-time offender. Unlike the appellant, he was convicted of accessing, possessing and distributing a "very limited" (*Shokouh* at para. 5) amount of child pornography. An expert opined that Mr. *Shokouh*'s likelihood of reoffending was low, noting that he had only two of the seven risk factors identified in a recidivism risk tool for child pornography offenders, and a significant number of protective factors. In light of this evidence, and other circumstances unique to Mr. *Shokouh*, the judge assessed his risk to reoffend as low. The judge described what she meant by "low", characterizing it as akin to the risk posed by Mr. *Ndhlovu* (*Shokouh* at para. 27). The sentencing judge in *Ndhlovu* found his risk to reoffend to be exceedingly low, expressing that she had "absolutely no concerns that [he] will re-offend" (*Ndhlovu* at para. 16). There is no basis to suggest the judge ought to have drawn a similar conclusion in this case.
- [70] As part of her analysis, the judge compared the appellant's circumstances to the circumstances of other offenders. She distinguished, correctly in my view, a decision relied upon by the appellant, *R. v. Towler*, 2023 BCSC 1209. Not only did this decision pre-date the legislative amendments, it was a case where the Crown consented to the offender's application for a constitutional exemption to registration. Moreover, as the judge noted, Mr. *Towler* was found to have "none of the risk factors that one would expect to be present" and posed a "negligible" risk to reoffend: *SOIRA Order Reasons* at para. 31.
- [71] The judge also distinguished, again correctly in my view, *R. v. Harroff*, 2024 BCSC 318. Mr. *Harroff* was a young first-time offender who pleaded guilty to making and transmitting child pornography after he had video recorded, and shared over social media, the sexual assault (perpetrated by two other persons) of a 13-year-old girl at a party. He was found to have been unaware of the victim's young age at the time: *Harroff* at para. 12. In addition to other distinguishing features, the judge noted that Mr. *Harroff* was found to have no indicated sexual attraction to children, be a low risk to reoffend "given the general tenor of the PSR

[Pre-Sentence Report] and the Crown's position on this point," and had not set out to intentionally exploit a child: SOIRA Order Reasons at paras. 36, 38.

- [72] The appellant criticizes the judge for finding certain factual similarities with Tarleton, where the offender's application for an exception was dismissed. Having reviewed the decision, I see no error in this finding, as certain factual similarities, such as the "depraved imagery" of children in the same age range as the appellant's materials (Tarleton at paras. 9, 31) and his risk to reoffend (Tarleton at para. 16), are apparent.
- [73] In any event, I am not persuaded the judge imposed a "near zero" risk standard upon the appellant. Rather, as the Crown submits, para. 37 (and the other concluding paragraphs) of the SOIRA Order Reasons summarizes the judge's analysis in which she engaged in a contextual consideration of all of the statutory factors, found factual parallels with a case where an exception was denied, distinguished others, and weighed the appellant's risk to reoffend as one factor of several to be considered.
- [74] For completeness, I would add the appellant has alleged another error in the judge's consideration of risk. As with his first ground of appeal, he contends the judge failed to identify how his registration would assist the prevention or investigation of child pornography offences, given the expert's assessment of him as "highly unlikely" to commit a "contact offence". I have addressed the flaws in this argument under the first ground of appeal.
- [75] For all of these reasons, I would not accede to this ground of appeal.

Did the judge err by considering the appellant's inter-provincial mobility as a factor weighing against the granting of a "gross disproportionality" exception?

- [76] To avoid the presumptive SOIRA order under s. 490.012(3)(b), the appellant was required to show that the impact of the order would not only be disproportionate to the public interest in his registration, but that it would be "grossly disproportionate", meaning "plainly, obviously, excessively, to a startling degree, flagrantly or glaringly" disproportionate: Eldon at para. 63, citing Debidin at para. 62. The standard of gross disproportionality is a high one and requires a marked and serious imbalance between the objective of the legislation and the impact of registration on the offender: R. v. D.D., 2020 BCCA 169 at para. 27. In short, for the appellant to have met his burden, he had to establish that the impact of a SOIRA order, "including on [his] privacy or liberty interest", would "clearly and substantially" outweigh the public interest in registration: Eldon at para. 65.
- [77] The appellant led no evidence relating to the particular impact a SOIRA order would have on him. Rather, he argued that the reporting requirements of a SOIRA order may impact his ability to travel from his current home in Ontario to visit his parents in British Columbia, perhaps on short notice given their advanced years. Although he was unemployed at the time of the hearing and adduced no evidence about realistic employment prospects that might require travel, he also argued that a SOIRA order may impact his ability to travel for

work, thereby limiting his employment opportunities and perhaps undermining his rehabilitation.

- [78] It would be helpful to repeat the judge's summary of her conclusion on gross disproportionality in the SOIRA Order Reasons:
- [40] As to the grossly disproportionate issue, I accept that the reporting has an impact on his privacy and liberty. However, given all of the factors discussed above, and having regard to his lack of stability, and by this I mean the recent move to Ontario, loss of career, and connection to both B.C. and Ontario, his movements and location are not predictable. In the circumstances, I am satisfied that the reporting requirement has a heightened practical value here. I am not satisfied that the impact would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature to be achieved by the registration.
- [79] The appellant asserts the judge erred in considering his inter-provincial mobility as a factor weighing against his application for an exception. He says that his movements between jurisdictions, particularly in light of his risk to reoffend, should have been viewed as a factor weighing in favour of his application, rather than against it. In my view, the judge made no such error.
- [80] The judge did not rely solely on the appellant's mobility to find he failed to meet his onus under s. 490.012(3)(b). As is clear from her concluding paragraph above, and the whole of her reasons, the judge considered all of the enumerated factors in s. 490.012(4) in conducting her analysis. Whether she considered the appellant's mobility as an aspect of his personal circumstances under subsection (d), or as a separate factor as permitted under subsection (g), there is no issue regarding its relevancy to the analysis. The judge determined that the appellant lacked stability and considered this to be a factor weighing against an exception. In making this finding, she considered the appellant's move from British Columbia to Ontario, the loss of his long-term career, and his connection to both British Columbia (his parents) and Ontario (his partner). From this, it was open to the judge to conclude the appellant's "movements and location are not predictable" and a "reporting requirement has a heightened practical value", and I see no error in her doing so.
- [81] The appellant argues because an offender's mobility (or travel requirements) was a factor that weighed in favour of granting an exception in other cases (see e.g., *R. v. D.M.W.*, 2024 BCPC 82 at paras. 57-64 and *R. v. Harding*, 2024 ABKB 144 at para. 82), the judge erred in treating it differently in his case. I do not agree.
- [82] To require a particular circumstance to be treated or weighed in the same manner in all cases would be to ignore the contextual, individual, and intensely fact-driven analysis that s. 490.012(3) requires. The offenders' circumstances in both *Harding* and *D.M.W.* are dissimilar to the appellant's, in many respects. Unlike the appellant's speculative travel needs, Mr. *Harding* presented evidence about his specific travel requirements (he owned a business employing other people and was required to travel throughout Western Canada), and he also

demonstrated how SOIRA's reporting requirements would be more onerous for him as a result: Harding at paras. 13, 81(h), 82. While there are also circumstances in D.M.W. that distinguish it from the appellant's case, I would also observe, respectfully, that fundamental aspects of the analysis in D.M.W. are inconsistent with recent appellate guidance in this area. In my view, it would be unsound to rely upon the findings or conclusions in that case.

- [83] It was for the appellant to establish that the impact of a SOIRA order, including on his privacy or liberty interest, would clearly and substantially outweigh the public interest in his registration. The appellant's submissions about his travel needs, and how SOIRA requirements might be more onerous for him, were speculative and did not support a finding of gross disproportionality. The judge made no error in considering his mobility as support for a finding the appellant lacked stability, or in considering that lack of stability as a factor weighing against an exception. The evidence fell far short of establishing gross disproportionality, and the judge reasonably concluded as much. I would not accede to this ground of appeal.

Conclusion

- [84] The SOIRA Order in this case was presumptive. The appellant bore the onus of establishing there was no connection between making the order and the specified purposes of SOIRA in requiring his registration, or that the impact of the order upon him would be grossly disproportionate to the public interest in his registration. In determining that he failed to meet his burden, the judge used the correct legal framework and conducted the required contextual analysis through the correct presumptive lens informed by the required statutory factors and other relevant circumstances. In my respectful view, the errors alleged by the appellant essentially amount to a disagreement with the judge's exercise of discretion and afford no basis for appellate intervention in this case.

Disposition

- [85] For the reasons provided, I would dismiss the appeal.

"The Honourable Justice Donegan"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Warren"

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