

CANADA / JUDGMENT

R. v. O.D.

2025 BCSC 2395

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2395 R. v. O.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. O.D.,

2025 BCSC 2395

Date: 20250612

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Registry: New Westminster

Rex

v.

O.D.

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Before: The Honourable Justice Elwood

Oral Reasons for Sentence

Counsel for the Crown:

T.J. Dotten

A. Kang, Articled Student

Counsel for the Accused:

R. Smith

E.C. Strain

Place and Date of Hearing:

New Westminster, B.C.

June 6, 2025

Place and Date of Judgment:

New Westminster, B.C.

June 12, 2025

I. INTRODUCTION

- [1] The accused O.D. is before the Court for sentencing after being found guilty of sexual interference and sexual assault contrary to ss. 151 and 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code].

II. Circumstances of the Offences

- [2] O.D. was convicted on two sets of two counts each arising out of sexual misconduct against his niece by marriage, A.J. The most recent incident occurred on January 20, 2020, when A.J. was 15 years old, and it is the most serious.
- [3] A.J. was visiting O.D.'s family at their home in Delta. She had travelled to the Lower Mainland from her home on Vancouver Island with her boyfriend, her brother, his girlfriend, and A.J.'s sister A.F.
- [4] On the second or third night of the visit, there was a party at O.D.'s house. The adults were intoxicated. A.J. was watching the children because O.D. and his wife at the time were not good with the kids when they drank. A.J. put the four older children to bed; however, the youngest child, who was three months old, required more attention from her.
- [5] A.J. laid down with the baby, behind her boyfriend on a pull-out couch in a downstairs living room. Her boyfriend was already sleeping on the bed. A.J. lay on her left side facing her boyfriend. The baby fell asleep between them.
- [6] O.D. entered the dark room, stood beside the pull-out couch and put his hands down A.J.'s shirt and on her breasts. She pulled his hands away and asked him to stop, but he kept putting his hands down her shirt. The baby woke up and started crying. A.J. tried to get up to comfort the baby, but O.D. forcefully pushed her back down.
- [7] A.J.'s sister, A.F., entered the room, briefly interrupting O.D. When she walked in, O.D. moved away from the bed and acted like he was just walking through the room. A.F. took the baby and left the room.

- [8] After A.F. left, O.D. got into the bed behind A.J. By this point, he had taken off his pants. A.J. tried to move closer to her boyfriend for comfort and protection, but O.D. pulled her back. He touched her breasts and put his hands down her pants and touched her vulva. He took one of her hands and tried to put it on his penis. Her hand contacted his penis briefly.
- [9] A.J. escaped from O.D. by climbing on top of her boyfriend and using the armrest of the couch to pull herself off of the bed. She ran up the stairs into a bathroom on the first floor. O.D. came upstairs after her, turned the bathroom light on and off, and asked if she was in there. A.J. did not say anything, but she was crying. O.D. said "please don't tell anyone" and walked away. He later left the house for the night, after his wife confronted him. A.J. returned home the next day, earlier than she had planned.
- [10] When the Crown charged O.D. for these offences, it charged him separately with sexual assault and sexual interference on multiple occasions between April 2012 and December 2019. The Crown only proved the most recent occasion beyond a reasonable doubt.
- [11] On that occasion, A.J. was visiting O.D.'s family at a previous house in Surrey. A.J. could not remember the date, but it may be inferred from her evidence that this incident occurred several months prior to the incident at the home in Delta in January 2020.
- [12] A.J. was sitting on a couch, alone in the living room. O.D. came into the room and started tickling her, as he sometimes did. On this occasion, he pulled her close on his lap and touched her vulva over her clothing. She said "stop, that's sensitive" to which he said "good to know", but continued to touch her. He also tried to put his hand into her pants, but was unable to do so because she kept moving around.
- [13] A.J. has provided a victim impact statement. In it, she describes a loss of innocence, nervousness, fear of re-traumatization, trust damage, pervasive doubt, excessive caution and damage to her relationship with her aunt, who was O.D.'s spouse at the time the offences occurred.

III. Circumstances of the Offender

- [14] O.D. is 34 years old. He is of Nisga'a First Nation ancestry. He recently received status under the Indian Act, R.S.C. 1985, c. I-5. His parents are both Nisga'a and grew up in Gingolx Village. He was raised by his stepfather.
- [15] O.D.'s maternal grandparents were both Nisga'a from Gingolx Village. O.D. did not meet his maternal grandparents because they passed away before he was born. His paternal grandparents are also Nisga'a. The grandfather passed away when O.D. was 17.
- [16] Both of O.D.'s parents grew up on reserve, attended Indian day school, and were sent from their village to the Greater Vancouver area in early adolescence as part of the Indian Boarding Homes Program. O.D.'s mother reports that all of his maternal aunts and uncles were forced to attend Indian residential schools.

- [17] O.D. is the youngest of five children. He has three surviving siblings. His brother Brad passed away in tragic circumstances when O.D. was 28.
- [18] O.D. himself has five children, ages five to 13. He is separated or divorced from their mother.
- [19] O.D. currently rents a house with two roommates. He is currently employed in the rebar construction industry. He reports that he makes a good income, which provides for all of his expenses such as rent, bills, and child support payments. He reports that he does not have any significant debts or assets.
- [20] He and his former spouse have an informal child support arrangement. Up until December 2024, O.D. was sending his ex-spouse the majority of his cheques, anywhere from \$2,000 to \$4,500 per month. He has since been paying the required amount of \$1,200 per month for child support.
- [21] O.D. has a Grade 12 education. He reports that he did not experience any academic or social difficulties in school, and that he had a group of close friends throughout elementary school, middle school, and most of high school.
- [22] O.D. has maintained steady employment in rebar since he was approximately 19 years old. He has never had difficulty holding or finding a job. He has extensive work experience and a good reputation amongst his employers. He owned his own business in rebar from the end of 2019 to the beginning of June 2021, but closed the doors due to overwhelming life circumstances.
- [23] O.D. was diagnosed with ulcerative colitis and underwent surgery to remove two inches of his colon in 2021.
- [24] O.D. states that he has not been diagnosed with or assessed for any mental health condition. He reports that since the offence occurred, however, he has experienced significant feelings of depression, self-loathing, and suicidal thoughts.
- [25] O.D. reports that he does not use illicit substances, and that he does not have problems with alcohol use, although he did drink around the time of the COVID-19 pandemic, and there is evidence that he was intoxicated on the night of January 20, 2020.
- [26] On November 17, 2020, a Ministry of Children and Family Development ("MCFD") social worker attended at O.D.'s home and made a safety plan that required O.D. to leave the family home immediately and not to see his children until the MCFD completed a child safety assessment.
- [27] On July 29, 2021, O.D. was arrested and charged with the offences for which he has now been convicted. The conditions of O.D.'s release included a condition that he not have any contact or communication or be in the presence of any person under 16 without the prior written permission of MCFD.

- [28] O.D. reports that these conditions forced him to exclude himself from all family-oriented functions such as birthdays, Christmases, and holidays, where his extended family, including nieces and nephews, would be, as well as adult-oriented functions like company parties where alcohol would be served. As a result of the MCFD safety plan and conditions of his release, O.D. reports that he has not seen his children in person for almost five years.
- [29] O.D. has no criminal record. With two minor exceptions, he complied with the conditions of release. He has always been polite and respectful in court.
- [30] O.D. continues to deny the allegations against him. He told the author of the Gladue report that he does not agree with the verdict in this case. He has not expressed any remorse for the offending conduct.

IV. Crown and Defence Positions

- [31] The Crown seeks sentences of 12 months for count 1, and 24 months on count 3 (both sexual interference), to be served consecutively, for a global sentence of 3 years imprisonment.
- [32] The Crown proposes a conditional stay on count 2 and 4 (sexual assault), pursuant to the Kienapple rule against multiple convictions for the same delict.
- [33] The Crown also seeks a number of ancillary orders, including an order requiring O.D. to register under the Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA] for a period of 20 years.
- [34] The defence seeks a conditional sentence order of two years less a day of house arrest, followed by three years of probation. The defence seeks an exemption from SOIRA.

V. Principles of Sentencing

A. General Principles that are Applicable in this Case

- [35] In all cases, the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (the principle of proportionality): Code, s. 718.1.
- [36] A sentence should be increased or decreased to account for relevant aggravating and mitigating circumstances relating to the offence or the offender: Code, s. 718.2. The Code provides a list of factors that must be considered aggravating, including a number that are relevant in this case:
- a) evidence that the offender abused a person under the age of 18: (s. 718.2(a)(ii.1));
 - b) evidence that the offender abused a position of trust or a family relationship: (s. 718.2(a)(ii) and (iii)); and
 - c) evidence that the offence had a significant impact on the victim: (s. 718.2(iii.1)).

- [37] The codified objectives of sentencing include denunciation and deterrence: s. 718(a) and (b). The Code requires that, when the victim is a vulnerable person, including because they are indigenous and female, the court must give primary consideration to denunciation and deterrence: s. 718.04.
- [38] That said, offenders should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and the harm done to the victim and the community (the principle of restraint): s. 718.2(d). Particular attention must be paid in this regard to the circumstances of aboriginal offenders: s. 718.2(e).
- [39] The sentence imposed should be similar to the sentences imposed on similar offenders for similar offences committed in similar circumstances (the principle of parity): s. 718.2(b).
- [40] Where consecutive sentences are imposed, the combined sentence should not be unduly or harsh (the principle of totality): s. 718.2(c).
- [41] Sentencing ranges provide guidelines for a fit and appropriate sentence; however, they are not hard and fast rules, and do not establish minimum or maximum sentences: *R. v. Parranto*, 2021 SCC 46 at para. 36.
- [42] Sentencing ranges reflect the gravity of the offence. The gravity of an offence is focused on the harmfulness and the wrongfulness of the conduct, not the personal characteristics of the offender or their background. Put another way, personal circumstances that may diminish an offender's moral blameworthiness or attract mitigating weight do not make the offence less grave: *R. v. Maslehati*, 2024 BCCA 207 at para. 76.
- [43] With the applicable range in mind, the judge must "... individualize the sentence in a way that accounts for both aspects of proportionality: the gravity of the offence and the offender's individual circumstances and moral culpability": *Maslehati* at para. 86 (emphasis in original), *Parranto* at para. 44.

B. Sentencing for Offences Against Children

- [44] In *R. v. Friesen*, 2020 SCC 9, the Supreme Court of Canada called for a recalibration of the approach to sentencing for sexual offences against children: at para. 5. Society's deepened understanding of the "wrongfulness and harmfulness" of sexual offences against children, the Court held, must be reflected in sentencing for those offences: at paras. 50, 60-67, 74-86. The Supreme Court instructed that:
- [76] Courts must impose sentences that are commensurate with the gravity of sexual offences against children. It is not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities (see *M. (C.A.)*, at para. 80; *R. v. Morrissey*, 2000 SCC 39, [2002] 2 S.C.R. 90, at para. 35).

- [45] The Court stated that mid-single digit penitentiary terms are normal for sexual offences against children, and upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. The Court further stated that "substantial sentences" can be imposed where there is only a single instance of sexual violence, and that maximum sentences ought not be reserved for the abstract case of the worst crime committed in the worst circumstances (Friesen at para. 114).
- [46] Beginning at para. 121 of Friesen, the Court provided a non-exhaustive list of the factors that should be considered in determining a fit sentence for sexual offences committed against children:
- a) likelihood to reoffend;
 - b) abuse of a position of trust or authority;
 - c) duration and frequency;
 - d) age of the victim; and
 - e) degree of physical interference.
- [47] In *R. v. C.K.*, 2023 BCCA 468, the Court of Appeal held that sentencing judges must engage in a close-examination of the "harmfulness" and the "wrongfulness" of the offender's conduct, and those considerations must be reflected in the sentence imposed:
- [58] [T]he harmfulness and the wrongfulness of an offender's conduct must be closely examined when determining a fit sentence for a child sexual offence. It is not enough to acknowledge the relevance of these considerations. The harms that flow from the conduct and the wrongfulness (or blameworthiness) of the offender's actions must be analyzed and applied to the individual circumstances of the case. Critically, they must be reflected in the sentence itself: *R. v. SADF*, 2021 MBCA 22 at para. 34; *Nystrom* at para. 53.
- [48] The Court provided a summary of the factors that must be considered in assessing an offender's personal responsibility for a crime:
- [71] Relevant factors include: the level of planning and/or intentionality brought to the crime; the degree, nature and extent of the offender's personal participation in the offence; the means or method by which the crime was committed; the motive or reasons for the offender's participation; the offender's awareness of the legal and moral wrongfulness of their conduct; their awareness of the actual or reasonably foreseeable harms flowing from their conduct (immediate and long-term); and their persistence in perpetrating the offence despite that awareness [citations omitted].

[49] In *R. v. J.F.D.V.*, 2025 BCCA 4, the Court of Appeal once again affirmed that sufficient weight must be given to case-specific factors relating to the wrongfulness and the harmfulness of sexual offending against children: at paras. 40-48. The Court further instructed that sentencing judges must ensure that they consider both the gravity of the offence and the moral blameworthiness of the offender, and reflect those considerations in their application of the proportionality principle of sentencing: at paras. 49-55.

C. Sentencing Indigenous Offenders

[50] In *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada instructed that s. 718.2(e) of the Code is remedial and intended to address the continuing crisis of overrepresentation of indigenous offenders in the Canadian criminal justice system.

[51] In *R. v. Kehoe*, 2023 BCCA 2, the Court of Appeal confirmed that sentencing judges are to take judicial notice of how Canada's colonial history and postcolonial assimilationist policies have translated into a disadvantaged position for indigenous offenders. This regrettable history does not justify criminal conduct, the Court said; rather it provides necessary context for understanding and evaluating case specific information during the sentencing exercise: *Kehoe* at para. 37.

[52] Because the circumstances of indigenous offenders may be significantly different from those of non-indigenous offenders, a sentencing judge must pay particular attention to two factors:

- a) the unique systemic or background factors that may have played a part in bringing the particular indigenous offender before the courts; and
- b) the types of sentencing procedures and sanctions that may be appropriate for the offender in the circumstances given their particular indigenous heritage and connection (*Kehoe* at para. 40).

[53] It is not necessary to establish a direct causal link between systemic and background factors and the offence at issue. How the complex interplay of historical factors has impacted a particular indigenous offender may be difficult or impossible to establish. Nevertheless, the specific systemic or background factors at play are critically important. They may help the court assess the moral blameworthiness of the offender or identify appropriate sentencing objectives: *Kehoe* at para. 42.

D. Conditional Sentence Orders

- [54] A conditional sentence order is a sentence of imprisonment that may be served in the community, subject to imposed conditions. Conditional sentence orders are authorized by s. 742.1 of the Code. Conditional sentences carry significant consequences. They are punitive, not lenient. They can be as harsh in application as sentences of incarceration: *R. v. Proulx*, 2000 SCC 5 at para. 41.
- [55] At the same time, a conditional sentence may not be appropriate in cases where punitive objectives such as denunciation and deterrence are particularly pressing. In *Proulx*, the Court said:
- 114 Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence.
- [56] Section 742.1 of the Code provides that a conditional sentence is only available for a term of imprisonment of less than two years, and only where it is consistent with the purposes and principles of sentencing.
- [57] Before imposing this form of sentence, judges must preliminarily turn their minds to the nature and length of sentence that would ordinarily be appropriate in the circumstances. This assessment is informed by the generally applicable range: *R. v. Fice*, 2005 SCC 32.
- [58] In *Maslehati*, the Court of Appeal held that "in cases involving an adult sexual assault with aggravating circumstances, a conditional sentence will rarely be available, even for offenders without a criminal record", without a factual finding of diminished moral blameworthiness or compelling mitigation: at paras. 11-12, 113.
- [59] Principally, this is because without either of those findings, a penitentiary term of at least two years' imprisonment will generally be required in a prosecution by indictment with aggravating circumstances, even for a first-time offender: *Maslehati*, para. 114.
- [60] Second, even where imprisonment of less than two years is imposed, the absence of diminished moral blameworthiness or compelling mitigation will generally render a conditional sentence for a sexual assault with aggravating circumstances inconsistent with the fundamental principles sentencing, namely denunciation and deterrence. *Maslehati*, para. 114.
- [61] In *J.F.D.V.*, a case that involved sexual offending against a child, the Court of Appeal held that sufficient weight must be given to case-specific factors relating to the wrongfulness and the harmfulness of the offending conduct before a conditional sentence order can be said to fully address the objectives of denunciation and deterrence: paras. 71-76.

- [62] The trial judge in J.F.D.V. had found that an appropriate sentence of incarceration would be two years less a day. The Court of Appeal held that the judge erred by "leaping" from a determination that the appropriate term of imprisonment would be less than two years, to a conclusion that a conditional sentence order was a fit and appropriate sentence.
- [63] J.F.D.V. is instructive because the victim was an indigenous child with a disability and the offences occurred in circumstances of a significant breach of trust. The Court found that a conditional sentence order in these circumstances was not consistent with the purposes and principles of sentencing; paras. 7-8.

VI. Analysis

A. Aggravating Factors

- [64] A.J.'s age, her vulnerability as an indigenous girl, O.D.'s relationship to her, and the impact of the offending conduct on the victim are all important aggravating factors in this case. The weight to be given to each factor must now be assessed in the particular circumstances of this case.
- [65] Age of the victim is one of the factors identified by the Court in Friesen that makes sexual offences against children particularly harmful and wrongful. The younger the child, the more the power imbalance between victim and offender. A child's personality and ability to recover from harm is still developing. Children who are abused at a young age must endure the consequential harm of sexual violence for a longer period of time. Exploiting a young child's helplessness and dependency enhances the gravity of the offence, and the moral responsibility of the offender: Friesen at paras. 134-135.
- [66] A.J. was 14 and 15 years old when the sexual offending took place. At this age, she was in many ways still a child; however, she also exhibited some markers of maturity: she had a boyfriend; she drank alcohol with the adults; she took responsibility for the younger children; and she possessed the instincts to escape from O.D. Her age is an aggravating factor, but not to the same extent as would be the case in an offence against a younger child who would have been more helpless and dependent.
- [67] Abuse of a position of trust is also one of the factors identified by the Court in Friesen as always aggravating, but falling along a spectrum. A child will likely suffer greater harm from sexual violence where there is a closer relationship and a higher degree of trust. Abuse of an important relationship of trust also increases the offender's degree of responsibility. A breach of a duty of protection and care owed to the child enhances the offender's moral blameworthiness. Exploitation of a child's particular vulnerability to trusted adults is especially morally blameworthy: Friesen at paras. 125-130.
- [68] The circumstances of this case fall midway along the spectrum of trust relationships, between a parent at the high end and a family friend at the low end. O.D. was not a father figure to A.J.; however, he was a member of her extended family in whom she necessarily

placed trust when she was in his home. O.D.'s wife was an important person in A.J.'s life. A.J. described her as a second mother. A.J. spent time at O.D.'s home, including multiple overnight trips. O.D. helped take care of her when she was visiting. On the day of the tickling incident, she was alone in his living room and allowed him to tickle her. On the night of January 20, 2020, she was lying on a bed in a dark room in his house. On both occasions, O.D. violated the inherent trust between children and adult family members.

- [69] The offending conduct also had a significant impact on A.J. Her victim impact statement provides poignant evidence of a traumatising violation of her trust and sexual integrity that has caused her lasting emotional and psychological pain.
- [70] The degree of physical interference is also an aggravating factor. During the incident in January 2020, O.D. touched A.J.'s breasts and her vulva under her clothes and placed her hand forcibly on his penis, albeit briefly. During the tickling incident, he touched her over her clothes in a sensitive and private place. While neither incident involved penetration or highly invasive touching, the touching on the bed in particular involved direct physical interference with sexual parts of A.J.'s young body. In addition, on both occasions, O.D. persisted after A.J. indicated that she wanted him to stop.
- [71] The Crown argues that a further aggravating factor is that the abuse occurred on two occasions, many months apart. In *Friesen*, the Court observed that multiple instances of sexual abuse increase the harm to the child. Multiple instances also increase the severity of the offence and the moral blameworthiness of the offender, because additional harm to the victim is a reasonably foreseeable consequence. The Court held that the frequency and duration of the abuse must receive weight in sentencing, even where multiple incidents are covered by a single count: at paras. 131-133.
- [72] In this case, I found that the Crown had only proved one tickling incident beyond a reasonable doubt. Given the subsequent incident on the bed, the circumstances of this case involve more than one isolated incident, which is aggravating. However, this case does not involve a pattern of repeated abuse over an extended time period, which would be more aggravating.
- [73] The fact that O.D. has not expressed remorse for the offending conduct is not an aggravating factor; instead, it is best understood as the absence of a potentially mitigating factor: *R. v. England*, 2022 BCSC 919 at para. 77; *R. v. J.N.P.*, 2020 BCSC 570 at para. 29.

B. Gladue Factors

- [74] Some systemic and background factors related to his indigeneity played a part in the offending conduct that brought O.D. before the Court, specifically:
- a) Intergenerational trauma and displacement;
 - b) Sexual abuse during his childhood; and

- c) Excessive alcohol use in the time period of the offence.
- [75] Recognizing that it is not necessary to establish a direct causal link between systemic and background factors and the offence (Kehoe, para. 42), these Gladue factors reduce O.D.'s moral culpability somewhat, although not as much as in a case like *R. v. Townsend*, 2024 BCSC 1313, where the connection between the offender's background and the offence was clearer.
- [76] In addition, O.D.'s experience in these criminal proceedings reflects systemic issues that are unfortunately all too common for indigenous offenders, including
- a) Negative experiences with social workers and law enforcement;
 - b) Strict conditions of release that prevented him from seeing his own children in person; and
 - c) Homelessness and feelings of helplessness and alienation from family.
- [77] These factors do not reduce O.D.'s moral culpability. However, they are relevant to the determination of a fit and appropriate sentence.

C. Mitigating Factors

- [78] O.D. has no prior criminal record. With two minor breaches, he complied with of the conditions of his release. The conviction will have a stigmatizing effect on him. These are valid mitigating factors: Maslehati at para. 144.
- [79] I accept the statements by his family members that O.D. is a hard working and loving father. Their continuing support speaks to his general good character and potential as a father (although it must be recognized that these positive attributes did not prevent O.D. from touching A.J., a child in his house, inappropriately).
- [80] O.D. testified on a voir dire that he was distressed by the separation from his wife and children as a result of the safety plan that MCFD put in place shortly after A.J.'s initial disclosure. He also told the author of the Gladue report that the prolonged separation from his family while he awaited trial and sentencing was very difficult for him, and that he experienced depression and suicidal ideation and even attempted suicide twice.
- [81] This experience should go a long way toward specific deterrence for O.D. In my view, the pre-trial separation from his family has also had a punitive effect. The conditions of his release may have been standard for an accused person charged with a sexual offence against a child. However, those conditions were particularly distressing and isolating for O.D. A term of imprisonment will cause additional separation and additional harm to his well-being and quite likely hardship for his five children for whom he is the sole income earner at this time.

- [82] Consideration of the consequences of family separation must not overwhelm other principles of sentencing. The Court must not to overlook the harm that the offender caused to the victim or the need for denunciation and deterrence. However, depending on the facts, family separation is a relevant factor that may justify a sentence reduction: *R. v. Habib*, 2024 ONCA 830 at paras. 41-45.
- [83] There is no expert evidence on which to assess the likelihood that O.D. will re-offend. However, I am satisfied on the evidence to which I have been referred that there is a low risk that he will re-offend sexually. By all indications, O.D. would like to live a normal family life after he completes his sentence. I think he understands that this requires that he never repeat misconduct of the nature that resulted in the charges against him.
- [84] These mitigating factors do not reduce O.D.'s moral blameworthiness. They must be balanced against the gravity of the offence, which was serious, and O.D.'s culpability, which subject to the Gladue factors I have mentioned was substantial: *Maslehati* at para. 145.

D. Comparable Cases

- [85] A comparison to similar cases assists in arriving at a sentence that accords with the principle of parity and is, therefore, proportionate to the gravity of the offence and the offender's moral culpability: *Friesen* at paras. 32-33.
- [86] Of the cases cited by the parties, I found the following the most helpful.
- [87] *R. v. Levins*, 2024 BCSC 1387: The offender was a house guest trusted by the victim's parents. The victim was sleeping when the offender began touching her. The assault included digital penetration into the victim's vagina. The offender had no criminal record. The Court imposed a sentence of three years. The degree of physical interference was higher and the case lacked the Gladue factors and some of the mitigating circumstances in this case.
- [88] *R. v. J.F.D.V.*, 2025 BCCA 4: The offender and the victim were both indigenous. The offender was an uncle living in the family home with the victim. The offending conduct involved a comparable degree of physical interference, although on more occasions. The trial judge imposed a conditional sentence order of two years less a day. The Court of Appeal set aside the conditional sentence order and replaced it with two years less a day of imprisonment.
- [89] *R. v. Williams*, 2011 BCCA 194: The offender and the victim were again both indigenous. Both were intoxicated at the time of the offence. The offender was an alcoholic. The degree of physical intrusion was more significant than this case. The offender put his hand in the victim's vagina and caused tears in her anatomy. The Court of Appeal upheld a sentence of two years. Notably, however, the case was decided in 2011, nine years before *Freisen*.
- [90] *R. v. Gerrard*, 2021 BCSC 1219: The offender was a trusted family friend. The offending conduct was comparable sexual touching. The offence had a significant negative effect on the victim. The offender had no criminal record. The Court found a very low risk he would re-offend, and no need for specific deterrence. Nonetheless, the Court found that a

conditional sentence order would be inappropriate given the importance of denunciation and general deterrence in cases of this nature, and imposed a sentence of 20 months imprisonment and two years probation.

E. What is the Fit and Appropriate Sentence?

- [91] This case requires a sentence that gives effect to the repeated directions from appellate courts that sentences for sexual offences against children must reflect the gravity of the offence and the harm that it caused. At the same time, the sentence must give effect to the importance of restraint and rehabilitation when sentencing indigenous offenders.
- [92] The aggregating circumstances in this case include the age and vulnerability of the victim as a young indigenous teenager, a breach of trust in which the offender exploited his position as a family member to gratify himself sexually, and harm to the victim emotionally and in her relationship with her family.
- [93] The mitigating circumstances include some diminishment of the offender's moral culpability based on systemic and background factors, no criminal record, a low risk of reoffending, a strong work ethic, good prospects of rehabilitation and the Court's awareness of the negative effects of the family separation in this case.
- [94] Considering all of these circumstances, I find that an appropriate sentence for count 3, the incident on January 20, 2020, is two years less a day.
- [95] The Crown and defence did not make separate submissions on an appropriate sentence for count 1, the tickling incident. The duration and degree of physical interference was less than count 3. The actual and foreseeable harm to A.J. was also less. I find that an appropriate sentence for count 1 is one year.
- [96] The Crown seeks consecutive sentences for counts 1 and 3 because, had the offences been charged in a single count, the Crown says it would have sought a sentence of three years.
- [97] In my view, the global sentence sought by the Crown exceeds what is appropriate given O.D.'s overall culpability. The Crown overstates the aggregating factors and understates the mitigating factors. Its overall proposal fails to achieve a proportionate balance between denunciation, deterrence, restraint and rehabilitation.
- [98] The totality principle requires me to adjust the aggregate sentence so that the total sentence is proper. In my view, the appropriate total sentence is two years less a day. Therefore, I will make the sentences on counts 1 and 3 concurrent, not consecutive.
- [99] I find that a conditional sentence order is not an appropriate sentence because it would not be consistent with the purposes and principles of sentencing. This is a case in which the need for denunciation and general deterrence require that the offender be incarcerated for his sentence so as to express society's condemnation of sexual offences against indigenous children and to deter similar offences by others.

[100] O.D. says he is willing to engage in any rehabilitative programs to which he is directed. He also says that he wants to continue working to support his family. While these are laudable objectives, they must not overwhelm the purposes and principles of sentencing. Moreover, O.D. has not taken any proactive steps toward rehabilitation in the community. He would benefit in my view from culturally appropriate programs while in custody.

[101] I find that an order of probation is appropriate. In my view, one year is appropriate in this case. The purpose of the probation order is not additional punishment of O.D. Instead, the purpose of probation is to give O.D. an opportunity to fully rehabilitate himself and take advantage of the resources identified in the Gladue report or similar programs in consultation with his probation officer.

F. Should O.D. be Exempted From SOIRA?

[102] Amendments to the Code following the decision of the Supreme Court of Canada in *R. v. Ndhlovu*, 2022 SCC 38, provide a discretion in making an order requiring the offender to register under SOIRA, except in certain circumstances when the order remains mandatory.

[103] Sexual interference (s. 151) is a primary offence under the relevant provisions of the Code. Because the sentence is less than two years, s. 490.012(3) applies and a SOIRA order is discretionary but presumptive. In other words, the Court is required to impose the order unless it is satisfied that the offender has established one or both grounds set out at s. 490.012(3):

Order -- other circumstances

(3)

- (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.

[104] Section 490.012(4) sets out a list of factors that the court must consider when determining whether to make an order under s. 490.012(3):

Factors

(4)

- (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.

[105] As discussed, the designated offence in this case was sexual interference with several aggravating circumstances, which is a serious offence. This factor weighs in favour of registration, but it is not determinative.

[106] The victim was young teenage indigenous girl and a member of the offender's extended family. This factor also weighs in favour of registration.

[107] The offender has no criminal record, and no prior history of sexual violence or aggression. Apart from these offences, he has exhibited prosocial behaviour, including gainful employment and paying child support. I have found that he poses a low risk re-offending sexually, a factor I may consider without the need for expert evidence: *R. v. M.K.M.*, 2024 BCSC 575, para. 136. These factors weigh against registration.

[108] Weighing these competing factors, I find that this is not a case in which there is compelling need in the public interest for an order requiring O.D. to register under SOIRA. However, I am unable to conclude that there would be no connection between making the order and SOIRA's purpose of preventing and investigating crimes of a sexual nature. Accordingly, O.D. has not established the exemption under subsection (a) of s. 490.012(3).

[109] Instead, O.D. should be exempted in my view under subsection (b). I find that the impact of a compliance order on his privacy and liberty would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature.

[110] In addition to the highly onerous requirements for anyone placed on the SOIRA registry, the burden of additional contact between O.D. and the police, potentially including random checks at his place of work, would make registration particularly onerous for this particular offender, given his evidence on the voir dire in these proceedings, as a member of a racialized community which has experienced a history of negative interactions with the police (Ndhlovu at paras. 5, 39–43, 55, 135).

[111] For these reasons, I decline to make an order pursuant to s. 490.012(3) of the Code requiring O.D. to register under SOIRA.

G. Ancillary Orders

[112] A conviction for sexual interference requires the Court to make an order pursuant to s. 487.04 that O.D. supply a sample of his DNA for inclusion in the National DNA databank.

[113] I will make an order pursuant to s. 743.21(1) that O.D. must not communicate with A.J. for the duration of his imprisonment. I will also make an order pursuant to s. 161(a.1) prohibiting him from being within 500 metres of any dwelling house where A.J. ordinarily resides, place of education, or workplace of A.J., as may be known to him. The Crown seeks a life-time prohibition. In my view, given the family ties between the parties and A.J.'s current age of 21, a period of 10 years is sufficient.

[114] Subject to certain exceptions, s. 737(2)(b)(ii) imposes a mandatory victim surcharge of \$200. I find that a payment of \$200 would cause undue hardship to O.D., whose priority should be paying child support. Accordingly, the victim surcharge is waived.

VII. Sentence

[115] O.D., please stand.

[116] I sentence you to a term of imprisonment of:

- a) One year for count 1;
- b) Two years less a day one year for count 3;
- c) To be served concurrently.

[117] You have spent two days in custody (December 14, 2021 and January 12, 2024) for breach of the conditions of your release, so three days shall be deducted from your sentence as credit for time served.

[118] Counts 2 and 4 are conditionally stayed.

[119] Following your release from custody, you will be placed on probation for a period of one year with the following conditions:

- a) You are to keep the peace and be of good behaviour.
- b) You are to appear before the court when you are required to do so by the court.
- c) You are to report no later than 4:00 p.m. on the next business day after your release from custody a probation officer at 14245 56 Avenue, Unit 102, Surrey, B.C., and thereafter as and when directed by your probation officer.
- d) Upon first reporting, you are to provide your address and telephone number to your probation officer and you are not to change either without first notifying your probation officer.
- e) You are to have no contact, directly or indirectly, with A.J.

- f) You are not to attend at any place known by you to be the residence, workplace, or place of education of A.J.
- g) You are not to possess any weapons as defined in s. 2 of the Code.
- h) You are not to possess any knives outside of your home, except for the immediate purpose of preparing or consuming food, or for the immediate purpose of carrying out lawful employment.

[120] Finally, you are subject to the following ancillary orders:

- a) an order in Form 5.03 pursuant to s. 487.051 of the Code that you provide a DNA sample;
- b) a non-communication order pursuant to s. 743.21(1) that you must not communicate with A.J. for the duration of your imprisonment; and
- c) an order pursuant to s. 161(a.1) that you must not be within one kilometre of any dwelling house where A.J. ordinary resides, place of education, or workplace of A.J., as may be known to you, for a period of 10 years.

[121] The correctional authorities are to be provided with a copy of the Gladue report and the pre-sentencing report.

"Elwood J."

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