

CANADA / JUDGMENT

R. v. T.B.

2025 BCSC 1700

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1700 R. v. T.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. T.B.,

2025 BCSC 1700

Date: 20250808

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v.

T.B.

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Before: The Honourable Justice Lamb

Oral Reasons for Sentence

Counsel for the Crown:

T. Sicotte

Counsel for the Accused:

J. Fernandes

Place and Dates of Hearing:

May 23, 2025

July 2, 2025

Place and Date of Sentence:

August 8, 2025

- [1] THE COURT: T.B. is before the Court today to be sentenced following his conviction on October 18, 2024 for sexual assault, contrary to s. 271 of the Criminal Code, R.S.C., 1985, c. C-46.
- [2] The Crown submits that a fit and proper sentence in the circumstances is an in-custody sentence of 24 to 30 months, together with probation if a sentence of less than 24 months is imposed. The Crown seeks various ancillary orders.
- [3] T.B. submits that a conditional sentence order of two years less a day is appropriate.
- [4] I have considered the submissions of counsel and the materials filed and referenced on this sentencing hearing. In these reasons for sentencing, I will review the circumstances of the offence, the impact of this offence on the victim, and the circumstances of the offender before reviewing the legal principles of sentencing that apply and how all of these lead to my conclusion on a fit sentence.

Circumstances of the Offence

- [5] In oral reasons for judgment delivered October 18, 2024, I set out in detail the circumstances of the offence upon which the conviction is based. For the purposes of sentencing, I will briefly summarize the circumstances of the offence.
- [6] At the time of the offence in January 2023, T.B. was 27 years old. He and G.F. had been in a dating relationship for approximately nine months after meeting through Alcoholics Anonymous. G.F. was 20 years old.
- [7] On Wednesday, January 11, 2023, T.B. arrived at G.F.'s home at approximately 10:00 a.m. They watched a movie in her bedroom as they cuddled on her bed. G.F. and T.B. started kissing. G.F. broke off the kiss and told T.B. that she did not want to have sex that day. He responded, "Okay". After some more cuddling, T.B. and G.F. kissed again. T.B. then kissed her more forcefully, and she kissed him back. He touched her arms, her breasts over her shirt and her thighs over her clothes.
- [8] T.B. then got on top of G.F. and pulled her pants and underwear down to her knees. He pulled her body to the edge of the bed and stood at the end of the bed facing her. T.B. unbuttoned his pants and pulled out his penis. He put two fingers inside G.F.'s vagina twice and then put his penis inside her vagina. He continued having sex with G.F. until he ejaculated inside her. He withdrew his penis. He pulled up his pants and buttoned them. He left shortly thereafter.

- [9] I found as a fact that T.B. had penetrative sexual intercourse with G.F. without consent. G.F. told T.B. that she did not want to have sex that day, and he took no steps to confirm she consented to penile-vaginal intercourse.

Victim Impact

- [10] At the sentencing hearing, G.F. provided a victim impact statement that summarized the impact this offence had on her and how this event continues to affect her on a daily basis. She also spoke to the drafter of the pre-sentence report.
- [11] The sexual assault perpetrated by T.B. caused various emotional impacts on G.F. She has experienced:
- a) flashbacks multiple times per day for more than two years;
 - b) nightmares about the offence;
 - c) difficulty trusting romantic sexual partners;
 - d) ongoing difficulty seeing or touching her own body; and
 - e) loss of mutual friends and shared support community.
- [12] For two years post-offence, G.F. continued to reside in the same house and sleep in the same bed where the sexual assault occurred. She experienced a great deal of distress arising from this constant reminder of what had happened to her. Fears for her security led her to relocate to a different city in British Columbia partway through her post-secondary degree. Before moving, G.F. had stopped attending A.A. because she feared running into T.B., resulting in G.F. suffering the loss of support of mutual friends within the A.A. community.
- [13] G.F. had undergone 86 hours of trauma counselling by the time of the sentencing hearing.
- [14] In the immediate aftermath of the sexual assault, G.F. felt the stress of possible pregnancy or sexually transmitted disease. The stress related to this criminal prosecution in particular interfered with her schooling. Her graduation date has been postponed because she reduced her course load due to residual emotions and difficulty concentrating after the trial in August 2024.
- [15] G.F. summarized the impact of the offence on her as follows:
- I was treated like not a human. Like how a bear leaves semen inside of a dead hiker by the person I love the most.

Circumstances of the Offender

- [16] T.B. is now 30 years old. He has support from his family and community as demonstrated by the five letters of support written on his behalf.

- [17] In terms of his background, T.B.'s biological parents separated when he was very young. T.B.'s mother married his stepfather when T.B. was two years old. T.B. has three younger step-siblings, a stepsister and two stepbrothers. He and his stepsister were raised by his mother and stepfather. His stepfather left the family home when T.B. was in grade 10, and they have no contact. T.B. continues to have regular contact with his mother. His maternal grandparents looked after him and his stepsister while his parents worked when he was a child.
- [18] When he was younger T.B. had limited contact with his biological father, J.B., but they reconnected six or seven years ago and now have regular contact. J.B. swore an affidavit outlining his background, including his Indigenous heritage, shortly before the continuation of T.B.'s sentencing hearing. J.B.'s father was born in Nunavut. J.B.'s paternal grandmother was Inuit and went to residential school in Montreal where she learned to reject her culture, language and heritage. J.B.'s grandmother carried out corporal punishment on his father. J.B. observed his own father abuse his mother regularly in the family home, leading to his parents' separation. J.B.'s mother took him to powwows and Indigenous gatherings when he was a child, but J.B. currently has no connection to Indigenous culture.
- [19] From the time he was an adolescent, J.B. has received psychiatric care for various mental health conditions. J.B. has a history of drug addiction and a longstanding active alcohol addiction. J.B. has been incarcerated multiple times and has experienced homelessness.
- [20] J.B. was only 17 years old when T.B. was born. As requested by T.B.'s mother, J.B. generally stayed away from T.B. when he was a child. J.B.'s incarceration caused T.B.'s mother significant emotional distress. J.B. describes himself as not a good father.
- [21] I have no information about T.B.'s connection to or knowledge of his Indigenous heritage. Defence counsel apparently learned about T.B.'s Indigenous heritage after the continuation of the sentencing hearing was scheduled. T.B. decided not to request a formal Gladue report to avoid further delay of the sentencing hearing.
- [22] T.B. currently lives in a house with his maternal grandmother. His stepsister lives in the basement suite with her partner.
- [23] T.B. is father to a four-year-old daughter with special needs. He co-parents well with the child's mother, even though their romantic relationship ended before the child was born. T.B. has parenting time on weekends and for extended periods on holidays.
- [24] T.B. has a high school diploma and is a Red Seal welder. After working as a welder for a few years and various other jobs, T.B. worked as a youth worker at the time of the index offence. T.B. has recently returned to working as a welder.
- [25] T.B. does not have a criminal record.

- [26] The court had the benefit of a pre-sentence report prepared by a probation officer and a report from a forensic psychologist. Neither report writer had the benefit of reading a transcript of my oral reasons for conviction and instead relied on pre-trial records or interviews with G.F. and T.B. to learn the circumstances of the index offence.
- [27] The pre-sentence report covered T.B.'s personal history including his history of alcoholism in his early 20s. T.B. has been sober for four years, motivated by his daughter's birth to address his addiction.
- [28] In the pre-sentence report, T.B. described his childhood as happy and stable. However, he disclosed for the first time to the pre-sentence report writer that he had been the victim of sexual abuse by an older boy when he was four years old. On three occasions, the older boy played a game with him that involved showing and touching each other's genitals.
- [29] According to the pre-sentence report, T.B. accepts the court's finding of guilt. He expressed empathy that G.F. feels victimized and is remorseful for any trauma he may have caused. However, "ultimately in his opinion they had consensual sex on the day the index offence occurred."
- [30] According to the forensic psychologist, T.B. denied any abuse or neglect as a child. T.B. denied experiencing any upsetting or traumatic experiences as a child. He denied being exposed to violence or substance abuse in the home.
- [31] According to the forensic psychologist, T.B. is at low risk to reoffend when dynamic risk measures are considered in combination with static risk factors and protective factors. According to the forensic psychologist, T.B. may not qualify for the forensic sex offender program due to his current low level of dynamic need, though he may benefit from further discussions on the issue of consent in the context of sexual activity. The forensic psychologist encouraged T.B. to continue engaging with A.A. and maintaining his sobriety, though substance use was not related to the index offence.
- [32] T.B. meets the DSM-5 criteria for alcohol use disorder currently in remission. T.B. reported a history of low mood, anxiety and cutting, but the forensic psychologist opined that T.B. did not meet the DSM-5 criteria for a mood disorder.
- [33] T.B. reported concern about ADD/ADHD features and was being investigated through his primary health provider with no diagnosis at present. The forensic psychologist noted these factors did not appear to be related to the index offence.
- [34] T.B. did not report any childhood sexual abuse to the forensic psychologist. T.B. acknowledged to the forensic psychologist that he likely relied on implicit consent when he engaged in penetrative sex with G.F. on the date of the index offence.
- [35] Neither the pre-sentence report nor the forensic psychologist report makes reference to T.B.'s Indigenous heritage.

- [36] T.B. addressed the court at his sentencing hearing. He expressed remorse and regret for the harm he caused to G.F.
- [37] T.B.'s letters of support came from family and friends. They describe T.B. as a caring father.

Principles of Sentencing

- [38] The fundamental principles to be considered by the court in sentencing are established by Parliament and set out in ss. 718 to 718.2 of the Criminal Code.
- [39] Section 718 provides that the fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions with reference to six objectives. The six objectives listed in s. 718 are denunciation of unlawful conduct, deterrence of the offender and other persons from committing offences, separation of offenders from society where necessary, assistance in the rehabilitation of offenders, provision for reparations for harm done to victims or to the community, and promotion of a sense of responsibility in offenders and acknowledgement of the harm done to victims or to the community.
- [40] In cases of serious sexual assault, the paramount sentencing objectives are denunciation and deterrence: *R. v. G.M.*, 2015 BCCA 165 at para. 17.
- [41] Pursuant to s. 718.1 of the Criminal Code, a sentence must also be proportionate to the gravity of the offence and the degree of responsibility of the offender. These two perspectives on proportionality "converge in the sentence that both speaks out against the offence and punishes the offender no more than is necessary": *R. v. Nasogaluak*, 2010 SCC 6 at para. 42.
- [42] At para. 75 of *R. v. Friesen*, 2020 SCC 9 [Friesen], the Supreme Court of Canada emphasized that "courts need to take into account the wrongfulness and harmfulness of sexual offences when applying the proportionality principle". *Friesen* was a case involving a sexual offence against a child, but at para. 34 of *R. v. Henry*, 2024 BCCA 132, Justice Newbury confirmed that *Friesen* is relevant to sexual offences generally.
- [43] In *R. v. Maslehati*, 2024 BCCA 207 [Maslehati], our Court of Appeal encouraged sentencing judges to avoid labelling a particular sexual assault as serious or not because every form of sexual assault is a serious act of violence that reflects "the wrongful exploitation of the victim whose personal autonomy, sexual integrity, and dignity is harmfully impacted while being treated as nothing more than an object": *Maslehati*, at paras. 72 to 73, citing *R. v. A.J.K.*, 2022 ONCA 487, at para. 74.
- [44] At para. 73 of *Maslehati*, our Court of Appeal provided guidance in terms of assessing the gravity of the particular offence, stating that it is:

... constructive when distinguishing between cases for purposes of sentencing to focus on the circumstances surrounding the offence at issue, including the nature of the sexual contact, its duration, the context in which it occurred, and the actual and reasonably foreseeable harms that flowed from it. The more aggravating the circumstances, the objectively graver the offence.

[45] Other sentencing principles are set out in s. 718.2 of the Criminal Code.

[46] Section 718.2(a) provides that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[47] The Crown says there are three aggravating factors identified in s. 718.2(a) of the Criminal Code that apply in this case: T.B. abused his intimate partner; the offence had a significant impact on the victim; and T.B. abused a position of trust.

[48] Our Court of Appeal recognized in *R. v. S.S.*, 2023 BCCA 207 it is not an error to consider that a sexual offence in the context of an intimate partner relationship may also be considered a breach of trust.

[49] At para. 74 of *Maslehati*, the Court of Appeal identified various aggravating factors, including the following that are relevant in the case at bar: highly invasive sexual contact, persistence in the face of communicated non-consent, and the violation occurred in the victim's home.

[50] Another important sentencing principle is that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances: s. 718.2(b) of the Criminal Code. This is called the parity principle. To achieve parity, the court often considers a usual range of sentences as a starting point.

[51] Section 718.2(d) provides that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.

[52] In light of T.B.'s Indigenous heritage, I must pay particular attention to s. 718.2(e):

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[Emphasis added.]

[53] Guidance for recognizing how Indigenous heritage affects sentencing was provided by the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688 [Gladue] and *R. v. Ipeelee*, 2012 SCC 13 and numerous B.C. Court of Appeal decisions pronounced in recent years, including *R. v. Hamer*, 2021 BCCA 297; *R. v. Kehoe*, 2023 BCCA 2 [Kehoe]; *R. v. Davis*, 2025 BCCA 113, and *R. v. Wiens*, 2025 BCCA 162 [Wiens].

[54] Recently, at para. 43 of *R. v. Isbister*, 2025 BCCA 185 [Isbister], our Court of Appeal summarized the court's direction from *Kehoe* in terms of how to consider Gladue factors in a particular case as follows:

- A sentencing judge must consider all surrounding circumstances, including the unique circumstances of the offender as an Indigenous person: at para. 41.
- It is not necessary to establish a direct causal link between systemic and background factors and the offences--this may be difficult or impossible to establish. However, the specific systemic or background factors at play are important to consider as they may help the court assess the moral blameworthiness of the person or identify the appropriate sentencing objective: at para. 42.
- Although restorative sentences may be more appropriate for Indigenous offenders, applying Gladue principles will not necessarily lead to a reduced sentence: at para. 43.
- The fact that an offender is Indigenous obliges a sentencing judge to consider Gladue principles but does not establish whether and how those principles will apply: at para. 49.

[55] The defence seeks a conditional sentencing order, which is only available for a term of imprisonment of less than two years. Before imposing a conditional sentencing order, I must first turn my mind to "the nature and length of sentence that would ordinarily be appropriate in the circumstances" which is "informed by the generally applicable range": *Maslehati*, at para. 57.

[56] In *Maslehati*, DeWitt-Van Oosten J.A. said at para. 92:

... in the absence of diminished moral blameworthiness or compelling mitigation, a penitentiary term of at least two years' imprisonment will generally be required for an adult sexual assault that is prosecuted by indictment and involves aggravating circumstances, even where that assault is committed by a first-time offender and does not involve penile penetration.

[57] In terms of whether a conditional sentencing order might be available when sentencing for adult sexual assault, even if a sentence of less than two years is considered fit, Justice DeWitt-Van Oosten said:

[115] ... the need to denunciate sexual violence is "so pressing" that in the absence of diminished moral blameworthiness or compelling mitigation, incarceration is generally required to express society's condemnation of the conduct: [citation omitted].

[58] Before moving on to applying this legal framework to the offence and offender, I will now set out the positions of the Crown and defence.

Crown's Position

[59] As noted at the outset, the Crown seeks an in-custody sentence of 24 to 30 months, together with probation if a sentence of less than 24 months is imposed. The Crown seeks various ancillary orders.

- [60] The Crown says the gravity of the offence is high based on the serious impact the sexual assault had on G.F. The Crown highlights the aggravating factors in this case include intimate partner violence and the fact the sexual assault took place in G.F.'s own home. Further, T.B. committed the sexual assault in the face of clearly communicated non-consent a few days after the parties had discussed the importance of clearly communicated consent. The Crown describes G.F. as vulnerable, as she was a young woman working on her sobriety who trusted T.B.
- [61] The Crown acknowledges T.B.'s Indigenous heritage must be considered. The Crown acknowledges inter-generational trauma likely played a role in separating T.B. from his Indigenous culture and was likely a factor in J.B. not participating in T.B.'s upbringing. In answer to the court's question, the Crown said T.B.'s moral culpability is somewhat reduced. The Crown has reduced the position it would have taken on the appropriate sentencing range by six months based on Gladue factors.
- [62] Even in light of T.B.'s Indigenous heritage and evidence of his good character, the Crown says an in-custody sentence of 24 to 30 months is required to reflect the gravity of the offence and to recognize the primary principles of denunciation and deterrence.

Defence Position

- [63] The defence says a 24-month conditional sentence order is an appropriate sentence in these circumstances. The defence emphasizes T.B.'s Indigenous heritage and urges the court to recognize the inter-generational trauma disclosed by J.B. The defence says T.B. was deprived of his biological father due to inter-generational trauma. The defence suggests that T.B. may have been more likely to understand G.F.'s non-consent if his biological father had been present in his life from an early age.
- [64] The defence says a conditional sentence order is appropriate in this case and submits s. 718.2(e) is directly applicable. The defence urges the court to impose a non-custodial sentence in light of T.B.'s Gladue history and factors.

Analysis

- [65] When sentencing for the offence of sexual assault, denunciation and deterrence are paramount. The first stage of the proportionality assessment requires consideration of the gravity of the offence. There is inherent gravity to the offence of sexual assault, and it is significant the Crown has prosecuted the charge by indictment.
- [66] There are a number of aggravating circumstances in this case:
- a) T.B. abused his intimate partner: s. 718.2(a)(ii);
 - b) The sexual assault occurred in G.F.'s own home;
 - c) The sexual contact (penile vaginal intercourse) was highly invasive;

- d) T.B. persisted despite G.F.'s communicated non-consent;
- e) G.F. was a vulnerable victim;
- f) The offence involved a breach of trust; and
- g) the offence had a significant impact on the victim.

- [67] I accept the Crown's submission that G.F. was a vulnerable victim. She was a young person working on her sobriety with the support of the A.A. community, which is where T.B. initially met G.F. T.B. and G.F. were friends before they started dating, and she entrusted him to safeguard her emotional, physical and sexual integrity. In my view, these circumstances further aggravate the nature of T.B.'s intimate partner violence. However, to be clear, I am not double counting by relying on the express abuse of trust aggravating factor set out in s. 718.2(a)(iii): see S.S. at para. 34.
- [68] These aggravating circumstances in combination serve to increase the gravity of the offence in this particular case. I accept these circumstances make this particular offence more serious than the lowest end of the range of wrongful conduct that falls within s. 271 of the Criminal Code. When assessing the gravity of the sexual assault, it is important to examine closely the harmfulness and wrongfulness of the accused's conduct: Maslehati at paras. 133 to 134. In terms of the known harm to G.F., based on her victim impact statement and her report to the author of the pre-sentence report, I am satisfied the offence had a significant impact on G.F. She was very traumatized. The sexual assaults were perpetrated by her then-boyfriend in her own home after she told him explicitly that she did not want to have sex that day. The harmful impact on G.F.'s dignity and personal autonomy was increased by T.B.'s indifference to her communicated non-consent, especially in the face of their recent understanding on the need for clearly communicated consent to sexual activity.
- [69] G.F.'s emotional trauma arising from the sexual assault includes an inability to trust another man, a fear of intimacy and commitment, and worry that T.B. would physically harm her or himself following his conviction. She no longer feels safe in her own home and moved to another municipality due to her fears for her security. G.F. lost the support of her local A.A. community when she stopped attending meetings for fear of running into T.B. G.F. faced the stress of possible pregnancy or sexually transmitted disease. She saw a counsellor more than 80 times as she attempted to deal with her emotional trauma. G.F. dropped out of one of her college courses as a result of difficulty concentrating, particularly following the trial, which cost her \$500. She estimates her graduation date will be delayed by a year, leading to further financial loss. The sexual assault caused trauma and isolation.
- [70] Turning to the second stage of the proportionality assessment, the degree of responsibility of the offender, I must consider T.B.'s personal circumstances and any aggravating or mitigating factors that would justify a departure from the usual sentencing range for sexual assault.

- [71] The first personal circumstance I must consider is T.B.'s moral blameworthiness. In this case, assessing T.B.'s moral blameworthiness involves consideration of two overarching factors:
- a) his state of mind at the time of the offence and his actions; and
 - b) any attenuating effect his Indigenous heritage has on his moral blameworthiness.
- [72] Based on the guidance provided by the Court of Appeal at para. 135 in *Maslehati*, the circumstances of the offence suggest that T.B. has a high degree of moral blameworthiness. He persisted with penetrative sexual intercourse after G.F. said she did not want to have sex that day. He subjugated G.F.'s right to bodily and sexual integrity to his own sexual desire.
- [73] It is unclear whether T.B. gave any consideration to the harm that might be suffered by G.F. as a result of his actions. However, his indifference to G.F.'s communicated non-consent suggests that he was equally indifferent to the impact non-consensual penetrative intercourse in G.F.'s own bedroom might have on his then-intimate partner. Objectively the risk of harm to G.F. in this context was high. T.B. was at least reckless to if not aware of this risk.
- [74] I find T.B.'s moral blameworthiness is heightened in this case because he and G.F. specifically discussed consent to sexual activity a few days before the offending conduct, and G.F. expressed the importance of "enthusiastic consent" to sexual activity and the importance of ensuring consent to sex is clear, obvious and transparent.
- [75] The question remains whether T.B.'s moral culpability is reduced in light of his Indigenous heritage. This requires consideration of the first factor identified at para. 40 in *Kehoe*: are there unique systemic or background factors that may have played a part in bringing T.B. before the courts? I recognize a causal link is not required.
- [76] In terms of Indigenous heritage, I recognize that T.B.'s great-grandmother, grandfather and father suffered the negative impact and residual effects of residential schools. T.B.'s great-grandmother rejected her own culture and heritage and distanced herself from her Inuit background. T.B.'s grandfather and father witnessed violence in the home. T.B.'s father played only a very limited role in T.B.'s upbringing, which may have occurred at least in part because of the inter-generational trauma.
- [77] The Crown acknowledged that T.B.'s Indigenous heritage and the inter-generational trauma caused by the legacy of residential schools and cultural and linguistic genocide serve to reduce T.B.'s moral culpability to some degree. However, the Crown's submission did not address how T.B.'s moral culpability is reduced in light of his personal circumstances. The defence also did not address this point in detail.
- [78] The defence relied on our Court of Appeal's comments at para. 17 of *R. v. Hotomani*, 2020 BCCA 64 [Hotomani], regarding the need for the court "to take judicial notice of the inter-generational trauma suffered in our Indigenous communities". Clearly, this is so. However,

in Hotomani the Court of Appeal went on to note that the offender's own experience in that case played an explanatory role in his commission of the offences for which he was convicted. In Hotomani, the offender's personal circumstances included his own alcoholism related to extensive inter-generational trauma and his own experiences as a young Indigenous man, including his attendance at residential school, all of which reduced his moral culpability.

[79] By contrast, in Isbister, the Court of Appeal did not find error where the sentencing judge was unable to accord much weight to Gladue factors in the offender's case due to limited information regarding how his particular circumstances were affected by his Indigeneity.

[80] Similarly in Wiens, a case where the offender was convicted of sexual assault, the Court of Appeal declined to find error where the sentencing judge found the paucity of evidence regarding the offender's Indigenous heritage and identity led her to conclude:

[44]. . . that she could draw no significance from it in terms of the role it may have played in bringing the appellant before the court, in the assessment of her moral blameworthiness, or in any other part of her analysis. . . .

[81] In the case at bar, the only evidence regarding T.B.'s Indigenous heritage comes from his father's affidavit. I accept that T.B. has Indigenous heritage. His great-grandmother was Inuit. I accept that there was inter-generational trauma that had an impact on T.B.'s family up to and including his father. The impact of such inter-generational trauma on T.B. is less clear. In particular, the role T.B.'s Indigenous heritage may have played in bringing him before the court and how it may have reduced his moral blameworthiness is far from clear. Even without a Gladue report, it would have been open to T.B. to provide information to the court about when he learned of his Indigenous heritage, how that heritage affected him, and what steps (if any) he has taken to connect with his Indigenous heritage. One reasonable inference from the history of these proceedings is that T.B. learned of his Indigenous heritage recently, perhaps after the original sentencing hearing date on May 23, 2025, as there was no reference to Indigenous heritage in the pre-sentence report, the forensic psychologist's report or T.B.'s original written submission on sentencing.

[82] It is significant that T.B. was raised by his mother to age two, by his mother and stepfather from age two until grade 10, and then his mother as a single parent. T.B. continues to live rent-free with his grandmother. There is no evidence that he was personally affected by systemic racism or disadvantage. There is no evidence that his childhood and time as a young adult were made more difficult or challenging by reason of his Indigenous heritage. There is no evidence that he was directly affected by the inter-generational trauma from which his biological father suffered.

- [83] I accept that T.B. may have benefitted from having a connection to his Indigenous heritage as he grew up, particularly after his stepfather left the family home. However, there is no evidence to allow me to infer that T.B.'s lack of connection to his Indigenous heritage played any role in bringing him before the courts.
- [84] Defence counsel suggests that one possible nexus between T.B.'s father's inter-generational trauma and T.B.'s appearance before the courts is that a closer connection with his biological father may have allowed T.B. to understand G.F.'s non-consent. In my view, this is speculative, particularly when a recent conversation with G.F. apparently did not come to mind or assist T.B. in appreciating the importance of communicated consent.
- [85] In summary, I accept that T.B. has Indigenous heritage. However, I am not able to attribute any significance to his Indigenous heritage in connection with his appearance before the court or my assessment of his moral blameworthiness or any other part of my analysis.
- [86] In terms of mitigating factors, the Crown acknowledges that T.B. does not have a criminal record and that the letters of support indicate he is a stable person with family and community support. The letters of support speak to his dedication as a father, which is noteworthy given the inconsistency of father figures in his own life. There are no other significant mitigating factors according to the Crown.
- [87] The pre-sentence report identified that when T.B. was four years old, he was subjected to three instances of sexual abuse by an older boy. This sexual abuse was first reported to the author of the pre-sentence report and has not been investigated. T.B. did not report this abuse to the registered psychologist. In my view, this evidence does not establish that this experience was a factor in his commission of the index offence. I note that T.B. denied any traumatic experiences during his forensic psychological assessment.
- [88] Without evidence of how the reported sexual abuse when he was four years old might have affected T.B.'s ability to assess right from wrong or might have led him to sexually assault G.F., I am not able to find reduced moral culpability nor do I find it is a mitigating factor. As noted by Justice Brongers at para. 53 in *R. v. Nielsen*, 2025 BCSC 255, it is now well-established that there must be specific evidence explaining the relationship between an offender's personal circumstances and the offending conduct in order for it to be considered as a mitigating factor: *R. v. G.J.M.*, 2024 BCCA 82 at paras. 57 and 58; *R. v. Nystrom*, 2023 BCCA 232 [Nystrom] at para. 22; and *R. v. Badhesa*, 2019 BCCA 70 at para. 43.
- [89] T.B.'s willingness to take responsibility for his crime has been variable. When speaking to the author of the pre-sentence report on November 6, 2024, and February 7, 2025, T.B. conceded that from G.F.'s perspective a sexual assault occurred. However, he maintained his opinion that they had consensual sex on the day of the index offence. When speaking to the registered psychologist on January 20, 2025, T.B. acknowledged that he likely relied on implicit consent on the day in question, as he and G.F. normally did, and that there was "something there [he] missed". T.B. told the psychologist that he must understand his part in the incident and there is more that he can do. T.B. did not acknowledge to the forensic

psychologist that G.F. conveyed her non-consent to penetrative sex, which I found as a fact occurred. When exercising his right of allocution, T.B. expressed regret for the harm he did to G.F. T.B.'s acceptance of some degree of responsibility has a small mitigating effect.

- [90] T.B.'s overall risk to reoffend is low. The pre-sentence psychological evaluation suggests that based on static risk factors he is in the average risk range to be charged or convicted of another sexual offence compared to other sexual offenders. His relative youth, the lack of a live-in partner for two years or more, and an unrelated victim are the static risk factors that increase his assessed risk to re-offend. When dynamic risk factors that might be addressed as part of correctional rehabilitation are considered, then T.B.'s overall risk of sexual offending was low. The psychologist opined that if future re-offending were to occur it would likely be similar in nature, i.e., where T.B. "misunderstands" consent within an intimate relationship. I note again that the psychologist did not receive a copy of my reasons for conviction, which included my finding that G.F. communicated non-consent and my finding that T.B. was at least reckless if not aware of non-consent. I would not apply the term "misunderstanding" to these circumstances.
- [91] The defence argues that T.B. has already suffered serious adverse consequences as a result of his conviction. He gave up his job working with youth. He will have a criminal record.
- [92] As stated earlier, it is a principle of sentencing that a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances. The Crown relies principally on *Maslehati*, which confirmed that the generally applicable range for sentencing in cases of sexual assault involving intercourse is two to six years. The Crown relies on *Nystrom* (three years' imprisonment for cognitively impaired youthful offender for three counts of sexual assault against a 14-year-old victim) and *R. v. Hawco*, 2024 BCSC 1307 (three years' imprisonment for forced oral sex and digital and vaginal penetration on a sleeping victim).
- [93] The defence cited and relied upon *R. v. G.D.L.*, 2022 BCSC 940 and *R. v. Hart*, 2023 BCSC 933 as cases where sentences of less than two years were imposed after a conviction for sexual assault. However, I accept Crown's submission that the weight to be attributed to these cases as valid comparators is lessened because they were decided before the Court of Appeal's decision in *Maslehati*.
- [94] The defence relies on *R. v. H.C.D.*, 2025 BCSC 450 [H.C.D.], as an example of a post-*Maslehati* decision where the sentencing judge imposed a sentence of 18-months incarceration for sexual assault. The offending conduct in *H.C.D.* involved a series of assaults over a period of 45 minutes by an older male on a younger female colleague while she was in her own home. The defence relies on the sentencing judge's comment that a CSO was not available because the aggravating factors made a CSO inconsistent with the fundamental purpose and principles of sentencing. The defence says the aggravating factors in *H.C.D.* were more significant than in the case at bar. However, I disagree: *H.C.D.* was not a case of intimate partner violence; and *H.C.D.* had pleaded guilty, saving the victim from being

retraumatized, which was a mitigating factor.

- [95] The defence points to *R. v. O.R.R.*, 2023 BCSC 2325 [O.R.R.] as a case where the sentencing judge imposed a two-year sentence in what the defence says were more aggravated circumstances. However, I find O.R.R. is quite similar in many respects to the case at bar. In both cases, there was one incident of non-consensual penile-vaginal penetration against an intimate partner who had clearly expressed her non-consent. The sentencing reasons in O.R.R. do not clearly address the impact of the offence on the victim, making it difficult to compare the gravity of the offence to the case at bar.
- [96] That said, in O.R.R. Justice Branch rejected the defence's proposal for a conditional sentencing order and instead imposed a two-year federal sentence. The sentencing judge said the following in reference to the two to six-year range for sexual assault suggested by our Court of Appeal in *G.M.*, comments that are relevant to the case at bar:
- [15] While I accept that the range allows for exceptions, and that the facts are sufficiently moderated to push this case to the bottom of the range, I do not see anything particularly exceptional that would cause me to push this case outside of the range. At a certain level, this case is squarely, but sadly, within the usual fact patterns that have considered these provisions, involving the abuse of a partner, where the Offender has children to care for and where the Offender has some support from the broader community. There simply is not enough for me to say that the Offender should benefit from anything beyond a determination that the case deserves to be at the bottom end of the range. . . .
- [97] Like many of the cases cited to me at the sentencing hearing, O.R.R. was decided before *Maslehati*.
- [98] The defence relies on *R. v. T.H.*, 2024 BCCA 123 [T.H.], which is a case in which the Court of Appeal showed deference to the sentencing judge's finding that a two-years-less-a-day conditional sentencing order followed by three years' probation was an appropriate sentence following a conviction for sentencing for sexual assault. The offending conduct in *T.H.* involved one incident of non-consensual penile-vaginal intercourse that caused significant psychological harm to the victim. Again, the original sentencing decision and the appellate decision that rested on deference to the sentencing judge both pre-dated *Maslehati*.
- [99] Finally, the defence relies on *R. v. M.K.M.*, 2024 BCSC 575 [M.K.M.], a case in which the sentencing judge imposed a conditional sentencing order of two years less a day followed by three years' probation for a sexual assault conviction involving non-consensual penile-vaginal penetration of an intoxicated and sometimes unconscious victim. In my view, *M.K.M.* is distinguishable based on the significance Gladue principles had in sentencing the offender, given the way systemic factors had played a role in bringing him before the court.

[100] This brings me to consider T.B.'s submission that a non-custodial conditional sentencing order should be imposed in this case. He is correct that, as noted by the Supreme Court of Canada in *R. v. Proulx*, 2000 SCC 5, a conditional sentencing order can achieve the objectives of denunciation and deterrence in some circumstances. However, as noted in *Maslehati* at para. 11, it will only be in the rarest of cases that a conditional sentencing order will ever be appropriate following a sexual offence conviction with aggravating circumstances, even for offenders without a criminal record. As outlined already, the aggravating circumstances in the case at bar include the fact that the sexual assault constituted intimate partner violence in G.F.'s own home after a clear statement that she did not consent to sexual intercourse.

[101] In my view, this is not one of those exceptional cases where a conditional sentencing order achieves the objectives of denunciation and deterrence. In particular, it is a case where a sentence of imprisonment of less than two years would not be proportionate to the gravity of the offence.

[102] Furthermore, as has been noted, I do not find as a fact that T.B.'s moral blameworthiness is diminished significantly or at all either as a result of his Indigenous heritage or otherwise or that there are sufficiently compelling mitigating factors in this case. In sum, none of the strict pre-conditions for issuing a conditional sentencing order in respect of a sexual offence are present here.

[103] I am mindful that my task as a sentencing judge is to craft an appropriate sentence for this particular offender with regard to the circumstances both of the offender and the offence together with the principles of sentencing I have referred to earlier. The principles of denunciation and deterrence call for a significant term of imprisonment despite the fact that T.B. is a first-time offender.

[104] T.B., please stand as I am now going to impose a sentence.

[105] Having considered all of the circumstances, the submissions of counsel and the law, I am satisfied that a 30-month term of incarceration is a fit sentence for sexually assaulting G.F.

[106] You may sit down, sir.

[107] With respect to ancillary orders, the following orders are made:

- a) The taking of a DNA sample pursuant to s. 487.051 of the Criminal Code; and
- b) a prohibition on possessing weapons for a period of not less than 10 years after T.B.'s release from prison for the offence of sexual assault and a lifetime prohibition on possessing prohibited and restricted weapons pursuant to ss. 109(1) and (2) of the Criminal Code.

[108] Further, T.B. is required to comply with the Sexual Offender Information Registry Act for a period of 10 years, pursuant to s. 490.013(3)(b) of the Criminal Code. T.B. argued that there is no connection between making this order and the purpose of helping police services prevent or investigate crimes of a sexual nature because the offence in this case was not

between strangers and any risk of re-offending would likely be with someone he knows. I am not satisfied these factors eliminate the connection between making the SOIRA order and the investigation and prevention of sexual offences. The forensic psychologist suggested T.B.'s greatest risk to re-offend would be in the context of a misunderstanding about consent. However, the psychologist was unaware that the sexual assault occurred in the face of a communicated absence of consent. T.B. is young. I am hopeful that he will not reoffend. However, he is a relatively young man who has shown variable insight into his offending behaviour. It is simply not possible to predict that T.B. is only at risk of future sexual crimes against someone he knows. I am not satisfied that there is no risk that any future re-offending would not benefit from his inclusion in the SOIRA registry.

[109] Further, I do not accept the defence submission that the fact the offence was against someone he knows and his risk of re-offending is likely to be with someone he knows makes the SOIRA registration grossly disproportion to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature.

[110] The reduction of time for registration from 20 years to 10 years reflects T.B.'s pro-social lifestyle and support network.

[111] I order that T.B. have no contact or communication directly or indirectly with the victim of his crime, G.F., for the duration of his custodial sentence pursuant to s. 743.21 of the Criminal Code.

[112] In light of the period of custody I have ordered, I am waiving the victim surcharge, as it would be a hardship for T.B. to pay when he will not be working for a lengthy period of time.

[113] Pursuant to s. 743.2 of the Criminal Code, I order that the following documents must be forwarded to Correctional Service of Canada: (1) a copy of these reasons for sentence; and (2) pre-sentence materials.

[114] Those are my reasons.

[115] CNSL J. FERNANDES: Yes, Justice.

[116] CNSL T. SICOTTE: Thank you, Justice.

"Lamb J."

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