

CANADA / JUDGMENT

R. v. T.C.S.T.

2023 BCSC 1656**COURT**

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1656 R. v. T.C.S.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. T.C.S.T.,

2023 BCSC 1656

Date: 20230802

Docket: 33320-1; 33320-2

Registry: Vancouver

Rex

v.

T.C.S.T.

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment. This publication ban applies indefinitely unless otherwise ordered.

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Before: The Honourable Madam Justice Ker

Oral Reasons for Sentence

Counsel for the Crown:

K. Hennessy

Counsel for the Accused:

R.C.C. Peck, K.C.

M. Gismondi

L. Chu

Place and Date of Hearing:

Vancouver, B.C.

June 1, 2023

July 31, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 2, 2023

- [1] These Reasons for Sentence were delivered as oral reasons. They have since been edited for distribution

Introduction

- [2] T.C.S.T., whom I may also refer to as "the offender", is before the Court for sentencing on one count on a three-count indictment. On June 1, 2023, T.C.S.T. appeared before the Court and entered a guilty plea to one count of sexual assault contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The general time period covered by the charge is January 1, 2015 to June 30, 2016. That timeframe is actually narrowed to between October 1, 2015, and June 7, 2016, as outlined in the admissions of fact marked Exhibit 1 on the sentencing hearing.
- [3] The victim of the sexual assault is T.C.S.T.'s stepdaughter, Z.K.L., who was between 12 and 13 years of age when the offending occurred. The offending occurred in the family home where Z.K.L. lived with her mother and stepfather. The offending included a number of violations of Z.K.L.'s sexual and physical integrity. Moreover, all of the inappropriate sexual contact with Z.K.L. occurred while T.C.S.T. was instructing her in tai chi.
- [4] As part of the sentencing process, T.C.S.T. has brought an application seeking a declaration that the mandatory order required by s. 490.012 of the Code, that he comply with the provisions of the Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA], violates his s. 7 Charter rights. Pursuant to s. 24(1) of the Charter, T.C.S.T. seeks a personal remedy exempting him from the SOIRA order regime. He relies upon the Supreme Court of Canada decisions in *R. v. Ndhlovu*, 2022 SCC 38 and *R. v. Albashir*, 2021 SCC 48.

- [5] T.C.S.T. faces a maximum penalty of 10 years' imprisonment and no mandatory minimum penalty, as the mandatory minimum in s. 271(a) of the Code was found by Justice Beames to be inconsistent with s. 12 of the Charter and not justified under s. 1 of the Charter in *R. v. E.R.D.R.*, 2016 BCSC 1759; see also *R. v. MacLean*, 2021 NLCA 24 at paras. 50-52, 83. The clause that increased the penalty to 14 years' imprisonment with a mandatory minimum sentence of one-year imprisonment was declared to be of no force and effect.

Position of the Crown and the Defence

- [6] At this sentencing hearing, the Crown and defence presented a joint submission on sentence. That is, they both recommended the same sentence be imposed. In the circumstances of this case, counsel jointly submit that a sentence of three years' imprisonment is appropriate and consistent with the purpose, principles, and objectives of sentencing as outlined both statutorily in the Code and in the jurisprudence. I will address the principles of joint submissions later in these reasons.

Circumstances of the Offences

- [7] I have already alluded briefly to the circumstances of the offences. A more detailed description is contained in the admissions of fact marked Exhibit 1 on this sentence hearing. Counsel for the Crown read the admissions into the record. The relevant facts are as follows:
1. ZKL came to Canada in January 2015. At the time, ZKL was 12 years old.
 2. TCST was in a relationship with ZKL's mother. At the time, TCST was 60 years old.
 3. When ZKL arrived, she moved into the family home in Richmond, BC, with TCST and her mother. ZKL could not speak English at the time, only Mandarin. TCST could speak English, Cantonese, and some Mandarin.
 4. In the spring of 2015, ZKL's mother encouraged ZKL to practice Tai Chi with TCST. ZKL's mother told ZKL that she should learn from TCST whenever he had time to teach her. ZKL had great trust in TCST.
 5. TCST began providing Tai Chi instruction to ZKL and her mother around once or twice per week in the evening in the family home.
 6. However, TCST was out of the country on business (in Hong Kong, Shenzhen, Guangzhou) from May 30 to June 29, 2015.
 7. Following the 2015 school year, ZKL returned to China to visit her grandparents for the summer.
 8. ZKL returned to Canada in time for school to resume in September 2015.
 9. TCST was again out of the country (in Europe) from September 2 to 9, 2015.
 10. In September, ZKL and her mother resumed their Tai Chi sessions with TCST.

11. In early-October, ZKL's mother became pregnant and stopped participating in the Tai Chi sessions.
12. Tai Chi sessions continued with TCST and ZKL about once per week until early-June 2016.
13. The offending behaviour occurred during these Tai Chi sessions.
14. There were weeks where there may have been two or three sessions. There were also weeks where there were no sessions due to TCST's work and travel schedule.
- ...
17. The Tai Chi sessions and the offending behaviour ceased just prior to when ZKL's mother gave birth to their son on June 7, 2016.
18. The following offending behaviours took place during the time period:
 - a. TCST kissed ZKL on her mouth on several occasions, including putting his tongue in ZKL's mouth on about three occasions;
 - b. TCST touched ZKL's bare breasts on several occasions;
 - c. TCST touched the top of ZKL's vagina with his fingers on several occasions;
 - d. TCST exposed his erect penis to ZKL on several occasions;
 - e. TCST contacted ZKL's vagina with his penis on one occasion, though he did not penetrate her vagina. To facilitate this TCST and ZKL were standing close to one another and facing each other with their pants pulled down;
 - f. TCST made ZKL kiss his penis on one occasion, this lasted for 1 to 3 seconds;
 - g. TCST ejaculated in ZKL's presence on one occasion after kissing her and touching her body.
19. At some point, TCST told ZKL not speak to her mother about what had occurred.
- [8] I note that paras. 15 and 16 of the Agreed Statement of Facts outline a number of dates where T.C.S.T. was either out of town on trips or involved in business dinners or evening social engagements, such that no tai chi instruction was offered during T.C.S.T.'s absences from the family home. Significantly, T.C.S.T. discontinued his abuse of his stepdaughter in June 2016 when his son was born.
- [9] T.C.S.T., his spouse, their son, and Z.K.L. continued to live in the family home until there was a domestic dispute between the offender and his spouse in November 2021. The police attended and T.C.S.T. was removed from the Richmond home. The offending against Z.K.L. came to light later on, with charges laid in March 2022. There is no suggestion that T.C.S.T. abused Z.K.L. after June 2016, notwithstanding living in the same residence for another five years and five months.

- [10] Thus, the circumstances of the offences, as outlined in the admissions of fact, establish that T.C.S.T. repeatedly violated his stepdaughter's sexual and physical integrity in committing a variety of sexual acts with her, but that did not include acts of penetration. The offending occurred over a period of months when Z.K.L. was between the ages of 12 and 13 years. The offending occurred in the family home while the offender was instructing his stepdaughter in tai chi.

Impact on the Victim

- [11] The harm flowing from these offences is not limited to the direct impact on Z.K.L. Z.K.L.'s mother, X.M., filed her own victim impact statement that outlined the toll her partner's offending against her daughter has taken on X.M. Insofar as X.M. is concerned, the impact upon her has been profound, as outlined in her victim impact statement, Exhibit Number 3.
- [12] X.M. suffers from depression, stress, insomnia, and nightmares. She has had to undergo counselling, as has her young son, who has not seen his father since November 2021 when the police were called.
- [13] X.M. fears for her security and that of her children. Significantly, the offender said a number of negative things about the victim in the presence of X.M., which caused her relationship with her daughter to become distant.
- [14] Insofar as Z.K.L. is concerned, her victim impact statement outlines the classic indicia of a young girl's traumatization as a result of being sexually abused by someone she trusted. Z.K.L. explains she has difficulty forming close relationships, she finds it hard to trust others, and also has issues expressing her true self.
- [15] Z.K.L. has experienced suicidal thoughts on many occasions, including holding a knife or scissors on top of her wrist. She has stopped herself from acting upon these ideations by thinking about those people who love her. Z.K.L. can be "triggered" by words like "sexual assault" or hearing the offender's name. On these occasions, her body starts shaking uncontrollably and she feels depressed and disgusted. Z.K.L. explained in her victim impact statement that when this happens, it is like she is re-experiencing the trauma. Z.K.L. is afraid of the offender contacting her and her family.
- [16] Z.K.L. and X.M.'s victim impact statements outline in unequivocal terms the significant impact that the offences have had upon them. Moreover, both victim impact statements clearly establish the harms that Z.K.L. and her family have experienced as a result of these offences. I accept and find that the offences have had a significant negative impact on Z.K.L. and her family.
- [17] In *R. v. Friesen*, 2020 SCC 9, the Supreme Court of Canada observed at para. 51 that sexual violence against children is wrongful because it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity. The Court went on to note the following:

- [55] These developments are connected to a larger shift, as society has come to understand that the focus of the sexual offences scheme is not on sexual propriety but rather on wrongful interference with sexual integrity. As Professor Elaine Craig notes, "This shift from focusing on sexual propriety to sexual integrity enables greater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety)" (*Troubling Sex: Towards a Legal Theory of Sexual Integrity* (2012), at p. 68).
- [56] This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that, as this Court held in *R. v. McCraw*, [1991] 3 S.C.R. 72, "may often be more pervasive and permanent in its effect than any physical harm" (p. 81).
- [57] A number of this Court's decisions provide insight into these forms of harm. In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, L'Heureux-Dubé J. emphasized the emotional trauma that the nine-year old complainant experienced from sexual violence (pp. 439-42). Similarly, in *McDonnell*, McLachlin J. (as she then was) stressed the emotional harm of "the violation of the child victim's integrity and sense of self-worth and control over her body" that the child victim experienced as a result of being sexually assaulted while sleeping (para. 111). The likely result of the sexual assault would be "shame, embarrassment, unresolved anger, a reduced ability to trust others and fear that . . . people could and would abuse her and her body" (para. 113).
- [58] These forms of harm are particularly pronounced for children. Sexual violence can interfere with children's self-fulfillment and healthy and autonomous development to adulthood precisely because children are still developing and learning the skills and qualities to overcome adversity (Sharpe, at paras. 158, 184-85 and 188, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; G. Renaud, *The Sentencing Code of Canada: Principles and Objectives* (2009), at § 12.64). For this reason, even a single instance of sexual violence can "permanently alter the course of a child's life" (Stuckless (2019), at para. 136, per Pepall J.A.). As Otis J.A. explained in *L. (J.-J.)*, at p. 250:
- [TRANSLATION] The shattering of the personality of a child at a stage where [the child's] budding organization as a person has only a very fragile defensive structure, will result -- in the long term -- in suffering, distress and the loss of self-esteem.
- [18] Suffice to say, I have no hesitation in concluding that these offences have had very significant negative consequences for Z.K.L., not only in respect of her personal autonomy, physical integrity, sexual integrity, and psychological well-being, but also in respect of damage to her relationship with her family and friends. She no doubt will be dealing with the psychological repercussions of the offending for years to come. The offender's conduct in using his stepdaughter for his own sexual gratification has robbed her of a significant and

formative period of her childhood.

- [19] In *R. v. A.H.K.*, 2022 BCSC 1563, I addressed the ability to take judicial notice of the significant negative impact that sexual offences against children have upon the victims. I acknowledge that *A.H.K.* is a significantly different case and far more aggravated, in terms of the nature of the offending, including acts of incest over the years. Nevertheless, my observations about the negative impact that sexual offences have upon child victims remains germane:
- [43] In *R. v. J.L.*, 2020 ONCJ 456, Justice Doody commented on the court's ability to take judicial notice of the profoundly injurious impact that sexual offences committed by adults can have on children:
- [7] I can take judicial notice of the effects on children of being preyed upon sexually by adults. The Ontario Court of Appeal endorsed, at para. 37 of *R. v. D.(D.)* (2002), 2002 CanLII 44915 (ON CA), 58 O.R. (3d) 788, the words of the Alberta Court of Appeal in *R. v. S.(W.B.)* and *R. v. P.(M.)*, 1992 CanLII 2761 (ABCA), 73 C.C.C. (3d) 530 at p. 535:

When the victim of a major sexual assault is a child, it is also no doubt true that such an assault frequently results in serious psychological harm to the victim.

When a man has assaulted a child for his sexual gratification, then, even if no long-lasting physical trauma is suffered by the child, it is reasonable to assume that the child may have suffered emotional trauma, the effects of which may survive longer than bruises or broken bones, and may even be permanent.

One consequence of being abused sexually may be that the child will never be able, as an adult, to form a loving, caring relationship with another adult of the opposite sex, being always fearful, even unconsciously, that such a partner will use sexual acts to hurt him or her rather than as an intimate expression of caring and affection. There is no empirical way of proving that a particular child-victim's emotional trauma will or will not make it more difficult or impossible for him or her to love another, without fear of abuse. We have only the recorded experiences of men and women who attribute their difficulties as adults in forming mature and fulfilling relationships to their having been abused sexually when they were children.

Another consequence of being abused sexually may be that the child, when he or she becomes an adult, will treat a child or children as he or she had been treated as a child -- that is, he or she may abuse a child sexually. There is no empirical way of proving that a particular child-victim, when he or she becomes an adult, will do to some child what had been done to him or her. We do know that sentencing judges are commonly told by defence counsel that the accused claims to have been sexually abused by a man (or by a woman, or both) who had stood in a parental relationship to him or her when he or she was a child.

- [8] The Supreme Court of Canada has held in its recent decision in *R. v. Friesen*, 2020 SCC 9 at para. 86, that:

Where direct evidence of the actual harm to the child is unavailable, courts should use the harm to the child as a lens through which to analyze the significance of many particular aggravating factors. Courts may be able to find actual harm based on the numerous factual circumstances that can cause additional harm and constitute aggravating factors for sexual violence against children, such as a breach of trust or grooming, multiple instances of sexual violence, and the young age of the child. We stress that direct evidence from children or their caregivers is not required for the court to find that children have suffered actual harm as a result of sexual violence. Of course, we do not suggest that harm to the child is the exclusive lens through which to view aggravating factors.

[44] I echo and adopt Justice Doody's observations on this point.

[20] Emotional and psychological trauma is not limited to the victim alone. The ripple effects from sexual offences causing victims to lose trust in the ability of family members to protect them causes additional harm to child victims through the damage inflicted upon relationships with their family members and others, and so the relational harm damaging children's relationships with their families and communities is a further significant detrimental effect: Friesen at paras. 60-61.

[21] The victim impact statements filed in this case are consistent with these observations from Friesen.

Circumstances of the Offender

[22] T.C.S.T. is 68 years old. He is a dual citizen of Canada and Hong Kong. He has no criminal record in Canada or abroad. He has an otherwise unblemished history of employment and good standing within his community, both professionally and personally.

[23] Mr. T. comes from very humble beginnings. He was born in Hong Kong and initially raised by his parents in the Western District of Hong Kong Island. The family lived in one of the "cage homes" of the area and in very impoverished circumstances. Mr. T.'s father was employed as a blacksmith. Part of his employment included fabricating the gates for the cage homes that Hong Kong's working poor lived in.

[24] Mr. T. is the eldest of seven children. When he was four years old, he fell from the family residence and sustained a serious head injury. Fortunately, he survived, although was hospitalized for a not-insignificant period of time for a small child. Once discharged from the hospital, he was sent to live with an aunt in a rural area of the Northern Territory of Hong Kong.

[25] T.C.S.T. lived with his aunt for about two and a half years. T.C.S.T. was then adopted by a Tibetan Buddhist Monk who taught him about Buddhism, feng shui, meditation, and other traditional Chinese practices. T.C.S.T. lived with the monk for six years. He then returned to Hong Kong to live with his family. The family's circumstances had improved. T.C.S.T. returned to more siblings and life in a small apartment.

- [26] T.C.S.T. completed high school in Hong Kong and worked at the same time, both tutoring elementary school students and doing piece work in a small factory. Following graduation from high school, T.C.S.T. attended technical college in Hong Kong, studying marine telecommunications. He was employed in that field for a brief period of time, but transitioned into a management role at a leading multinational corporation involved in developing and operating ports around the globe. T.C.S.T. was successfully employed in this field for many years.
- [27] T.C.S.T. has two adult children from a previous marriage who live in Hong Kong and the United Kingdom. T.C.S.T.'s 90-year-old mother, who is in poor health, still lives in Hong Kong, as do his six siblings.
- [28] T.C.S.T. and his first wife and children moved to Canada in 1990. In 1994, his wife and children returned to Hong Kong, but T.C.S.T. continued to support his family. He is a self-employed practitioner of traditional Chinese philosophies, including tai chi, feng shui, fortune telling, and Chinese astrology.
- [29] As outlined in the detailed materials and thorough background provided by T.C.S.T.'s counsel, the offender has been very successful in his business. He provides feng shui consulting services to a wide range of clientele, including individuals, companies, and construction firms, designing residential and commercial projects. His services are local, national, and international in scope. He has also published a number of books on feng shui and Chinese astrology. He regularly provides New Year predictions based on the Chinese zodiac for a number of media outlets and hosts a weekly radio show related to fortune telling.
- [30] Consistent with his professional success, T.C.S.T. has been involved in a number of philanthropic endeavours, fundraisers, and charity functions for a number of local organizations.
- [31] Approximately a decade ago, T.C.S.T. and X.M. met and they began a relationship. X.M. moved in with T.C.S.T., and her daughter, the victim in this case, moved in with them in January 2015.
- [32] In June 2016, T.C.S.T. and X.M. had a baby boy. As noted previously, T.C.S.T.'s offending against Z.K.L. occurred between October 2015 and June 2016, ending just before T.C.S.T.'s son was born.
- [33] T.C.S.T. was assessed by Dr. Patrick Bartel, a forensic psychologist, who has provided a comprehensive psychological assessment of T.C.S.T. that is included in Exhibit 4 in this sentencing hearing. T.C.S.T. explained to Dr. Bartel his erroneous thinking about the offences, stating that he "sort of fell in love" with Z.K.L. As Dr. Bartel notes:
- [7] [T.C.S.T.] states that his thinking around the offence was erroneous as he "sort of fell in love" with K.L. believing that she liked him as well. He reports that he would justify his offending behaviours by believing that if she did indeed love him, it would make their sexual activity

together okay. He also states that he convinced himself that he was in a master/student relationship with K.L. which, according to [T.C.S.T.], justified his actions. He states: "My ego was telling me this." He states that despite these justifications, he always knew what he was doing was wrong and illegal. He states that it was wrong because K.L. was his stepdaughter and illegal because she was too young. He said he eventually stopped offending because he felt guilty. He guesses that K.L. feels bad and angry towards him for sexually assaulting her.

- [34] Since T.C.S.T.'s arrest in November 2021, he has had no contact with his former common law partner, his son, or Z.K.L. The lack of contact with his young son has been exceptionally difficult for T.C.S.T. The outstanding family claim has been resolved without the need for litigation and T.C.S.T. continues to provide a significant amount of child support for his son.
- [35] T.C.S.T.'s legal woes will not end today with the imposition of sentence for these offences. On July 25, 2023, he was served with a notice of civil claim wherein Z.K.L. is seeking damages for the offending conduct that is the basis of this current proceeding.
- [36] T.C.S.T.'s mental and physical health is documented in reports from his family physician, Dr. Peter Chang, and Dr. Bartel's psychological assessment. Counsel for T.C.S.T. has succinctly summarized the state of T.C.S.T.'s mental and physical health in their written submissions, which I will outline here:
28. Over the last 20 months, [T.C.S.T.] has experienced low mood along with feelings of guilt, sadness, loneliness, and worthlessness. He has also contemplated suicide. To assist with those difficulties, [T.C.S.T.] has attended weekly sessions with his treating psychologist, Dr. Carla Dassinger. Critically, Dr. Dassinger provides psychological services (and sex offender-specific programing) to federal inmates. She has expressed a willingness to continue working with [T.C.S.T.] while in custody. [T.C.S.T.] intends to resume his sessions with Dr. Dassinger during his sentence.
29. Dr. Dassinger, along with Dr. Patrick Bartel, a psychologist who independently assessed [T.C.S.T.] (details of Dr. Bartel's report are set out below), both provided diagnostic opinions relating to [T.C.S.T.]'s mental health. Dr. Dassinger reports that [T.C.S.T.] presents as depressed, and, at times, meeting the criteria for major depressive disorder. Dr. Bartel indicates that [T.C.S.T.] suffers from the presence of an adjustment disorder with anxiety and depressed mood. In sum, both experts agree that [T.C.S.T.] has suffered from mental health difficulties relating to depression since his arrest.
30. In addition to mental health struggles, [T.C.S.T.] suffers from several physical ailments and illnesses, including elevated cholesterol and arteriosclerotic heart disease, chronic active Hepatitis B, increased blood sugar, and an enlarged prostate. He is currently being investigated for a possible prostate cancer diagnosis. Furthermore, [T.C.S.T.] is susceptible to renal colic attacks and acute urinary retention (due to enlarged prostate). As a result, he needs to urinate frequently.

Dr. Bartel's Risk Assessment Report

[37] As mentioned previously, T.C.S.T. has been assessed by Dr. Bartel, a noted forensic psychologist who is trained in conducting forensic risk assessments and regularly offers considered opinions on risk assessment in a variety of criminal cases. T.C.S.T. met with Dr. Bartel on June 28, 2023 for psychological interviewing and testing. Dr. Bartel conducted a collateral interview with Dr. Dassinger on July 13, 2023. On July 19, 2023, Dr. Bartel provided a written report with respect to diagnosis, risk, and risk management in relation to T.C.S.T.

[38] In his report, Dr. Bartel noted at para. 13 that during his interview "[T.C.S.T.] presented as pleasant, [and] cooperative. . . His mood was generally calm and stable." Dr. Bartel also found "no behavioural evidence of thought disorder or cognitive disorder."

[39] Dr. Bartel's opinion relating to T.C.S.T.'s personality is set out at para. 23 of his report, which states:

Regarding personality, [T.C.S.T.] presents as prosocial with no indication of antisocial personality traits. Based on the information available, apart from the index offence, he has no history of antisocial behaviour. He does not present with additional indicators of antisocial personality such as irresponsibility, lack of remorse, deceitfulness, impulsivity, or aggression. Furthermore, unlike individuals with antisocial personality, he reportedly has lived a prosocial life with consistent schooling and gainful employment. He is positively attached to career, family, and prosocial interests. There are no additional markers of what I would deem to be personality pathology or disorder.

[40] With respect to a potential sexual disorder or paraphilia diagnosis, Dr. Bartel concludes that T.C.S.T. does not appear to present with any paraphilic disorder. At para. 24, Dr. Bartel notes:

Regarding a potential sexual disorder or paraphilia diagnosis, [T.C.S.T.] does not appear to present with any paraphilic disorder, in other words, a pattern of recurrent, intense, sexual urges, fantasies, or behaviours that involve deviant or illegal sexual conduct. He reports being sexually attracted to and interested in adult women. Apart from the index offence, his history of sexual behaviour and interest reportedly exclusively involved adult or same-aged women. It is also important to note that to have a positive diagnosis for a paraphilia, the pattern of behaviour must be persistent and pervasive over the long term. The information provided suggests that this is not the case with [T.C.S.T.]. Even with the assumption that he engaged in sexual offending behaviour with the victim, there is no evidence of a paraphilia, given that the victim was presumably pubescent or sexually mature (i.e., sexual interest and behaviour involving adolescents, although illegal, is not considered mentally disordered or paraphilic).

[41] Dr. Bartel administered two psychometric risk assessment tools: the Static-99R and the Risk for Violence Protocol, or RSVP. Of the ten-item scale of risk factors assessed by the Static-99R, only one of the risk factors was deemed to be present, that being an unrelated victim. The remaining nine Static-99R risk factors were deemed absent such that, on the Static-99R risk assessment, T.C.S.T. was rated well below-average risk on this scale.

- [42] Insofar as the RSVP is concerned, it is Dr. Bartel's preferred risk assessment tool as it is more comprehensive, addressing more dynamic factors. Significantly, Dr. Bartel noted the following for T.C.S.T.:
- [28] In applying the RSVP risk factors to [T.C.S.T.], there are no sex offence specific RSVP risk factors fully present in this case such as chronicity of sexual offending, escalation of sexual offending, problems related to self-awareness, sexual deviance, diversity of sexual offending, extreme minimization/denial, attitudes that condone sexual offending or use of physical or psychological coercion in offending. The risk factor 'problems with child abuse victimization' is partially present as [T.C.S.T.] reports being sexually victimized by male peer as a child, although he doesn't view this as traumatic. Similarly, outside of one risk factor, there are no nonsexual specific risk factors present in this case including nonsexual criminality, employment problems, substance use problems, problems with stress or poor coping, psychopathic personality, major mental illness (at the time of offending), nonintimate relationship problems (at the time of offending), violent ideation, or problems with planning, treatment, and supervision. The only risk factor deemed present is suicidal ideation given the recent presence of suicidal ideation without intent or planning.
- [43] In addressing the issue of likelihood to reoffend, Dr. Bartel concludes at para. 29 that T.C.S.T. presents as a low risk to reoffend sexually. Dr. Bartel details his opinion as follows:
- [29] Regarding prognosis, it is my opinion that [T.C.S.T.] is at low risk to sexually reoffend in the future at this time. His risk is low as he presents with no prior history of sexual offending over his lifetime. Apart from engaging in several acts of sexual offending with his underage stepdaughter, there is no indication that [T.C.S.T.] has sexually offended against other children or adults. It is also positive prognosis-wise that he ceased offending and did not return to offending behaviours over an approximate five-year period leading up to the allegations. [T.C.S.T.]'s advancing age is another important factor that impacts risk as increasing age is negatively associated with sexual offending. He also doesn't present with some of the more general and life destabilizing risk factors. Furthermore, it is likely that his being arrested and convicted on the index offence will serve as a deterrent from any further offending in the future.
- [44] The Crown took no issue with Dr. Bartel's opinion. I have no hesitation in accepting this opinion. It is a significant piece of evidence that informs not only the joint submission in this case, but also the Court's decision in respect of the appropriate sentence to impose and the issue of a s. 24(1) Charter remedy in respect of an exemption from an otherwise mandatory 20-year SOIRA order.
- [45] T.C.S.T.'s significant remorse is fundamentally apparent through not only how this case has been conducted, that is early resolution discussions, but also through T.C.S.T.'s discussions with Dr. Dassinger and Dr. Bartel, and in T.C.S.T.'s comments to the Court at the sentencing hearing.

- [46] I accept that T.C.S.T. is profoundly and genuinely remorseful for having engaged in this offending and for having harmed his stepdaughter so significantly. T.C.S.T. hopes that he will eventually be able to re-establish a relationship with his son, but recognizes that this no doubt will require the assistance of a counsellor or other professional, should his son be prepared to engage in reconciliation.
- [47] T.C.S.T. hopes to be able to return to his work that he has found to be so fulfilling once he has completed his sentence.

The Governing Legal Principles

Principles of Sentencing

- [48] The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond any mathematical calculation. Many courts have recognized that imposing a just and proportionate sentence in serious cases like this one is one of the most challenging responsibilities that judges must exercise. It involves the careful balancing of a variety of factors in the context of a particular set of circumstances in respect of a particular offender. This balancing process occurs within a legislative framework that is informed by common law principles.
- [49] The legislative framework, which is set out in ss. 718 through 718.2 of the Code, enumerates the purpose, objectives, and principles to be considered in sentencing.
- [50] Section 718 of the Code 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. These objectives are: denunciation of unlawful conduct; deterring the offender and other persons from committing offences; separating offenders from society where necessary; assisting in rehabilitating offenders; providing reparations for harm done to victims or to the community; and promoting a sense of responsibility in offenders and acknowledging the harm done to the victims or to the community.
- [51] Section 718.01 of the Code mandates that because the offences in this case involved the abuse of a person under the age of 18 years, I must give primary consideration to the objectives of denunciation and deterrence in sentencing T.C.S.T., and I do.
- [52] I recently addressed the principles of sentencing in *R. v. T.A.P.*, 2023 BCSC 316. Although T.A.P., like A.H.K., involved a far more egregious set of circumstances with three victims, two of whom were the offender's daughters, and involved offending over a period of years, the animating principles reviewed in T.A.P. remain germane to the analysis of this case. While lengthy, I repeat and adopt what I stated in T.A.P.:
- [84] Section 718.1 of the Code sets out the proportionality principle, which directs that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the offender. The proportionality principle is fundamental to Canadian law.

Thus, whatever weight a judge might wish to accord to the objectives listed in s. 718, the resulting sentence must respect the fundamental principle of proportionality: *R. v. Nasogaluak*, 2010 SCC 6 at para. 40; *R. v. Parranto*, 2021 SCC 46 at paras. 11-12; *Friesen* at para. 30.

- [85] Section 718.2 of the Code enumerates, in a non-exhaustive list, a number of other sentencing principles. Pursuant to s. 718.2(a), sentences are to be increased or reduced to account for any aggravating or mitigating circumstances. Section 718.2(b) sets out the parity principle, which requires that sentences should be similar for similar offences committed by similar offenders in similar circumstances.
- [86] Sections 718.2(c) through (e) promote restraint in sentencing. Section 718.2(c) sets out the totality principle, which requires that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh. Sections 718.2(d) and (e) emphasize the need for restraint in the use of imprisonment. These provisions require that an offender not be deprived of liberty if less restrictive sanctions are appropriate in the circumstances.
- [87] Accordingly, courts should consider all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community, with particular attention to the circumstances of Indigenous offenders.
- [88] As noted, s. 718.2(a) enumerates a number of statutory aggravating factors. At least two of the statutory aggravating factors are engaged in this case: s. 718.2(a)(ii.2), abuse of a person under the age of 18, as all three victims were under the age of 18 years; and s. 718.2(a)(iii), abuse of a position of trust, as two of the victims were T.A.P.'s daughters and the third victim was the daughter of one of his closest friends. The third victim was also one of B.'s closest friends.
- [89] Section 718.2(b) of the Code addresses the parity principle. While I am mindful of it, I also must not lose sight of the individualized nature of the assessment of the case before me: an assessment that requires me to weigh the objectives of sentencing in a manner that best reflects the circumstances of this case and of this offender: *Nasogaluak* at para. 43.

Specific Considerations for Sentencing in Cases Involving Sexual Offences Against Children

- [90] In its ground-breaking decision in *Friesen*, the Supreme Court of Canada provided clear direction on "how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children": *Friesen* at para. 1.
- [91] The Supreme Court of Canada could not have been clearer about the need for change in the approach to sentencing for sexual offences committed against children. Their direction is pointedly articulated in *Friesen*:

- [5] Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.
- [92] Recently in *R. v. Coban*, 2022 BCSC 1810, Justice Devlin reviewed a number of features of the principles of sentencing engaged in sentencing for sexual offences committed against children. In particular, she reviewed the harm that such offences cause, writing:
- [94] Friesen detailed the many forms of harm that come from sexual offences against children--both in childhood and in adulthood--and underscored that the harms of child sexual offences "can be so profound that children are 'robbed of their youth and innocence'": at para. 80. The Court emphasized some of the long-term harms that victims of child sex offences can carry into adulthood, including that they are more likely to struggle with mental illness, suicidal ideation, and substance abuse: Friesen at para. 81.
- [95] Additionally, in sentencing for sexual violence against children, courts must focus their attention on not only physical harm, but also on emotional and psychological harm, the effect of which "may often be more pervasive and permanent" than that of any physical harm: Friesen at para. 56, citing *R. v. McCraw*, [1991] 3 S.C.R. 72, 1991 CanLII 29.
- [96] As well, the Court in Friesen instructed sentencing judges to not lose sight of the harms engendered by sexual violence against children to victims' families. In the Court's words:
- [63] The ripple effects of sexual violence against children can make the child's parents, caregivers, and family members secondary victims who also suffer profound harm as a result of the offence. Sexual violence can destroy parents and caregivers' trust in friends, family, and social institutions and leave them feeling powerless and guilty (*R. v. C. (S.)*, 2019 ONCA 199, 145 O.R. (3d) 711, at para. 6; *Rayo*, at para. 39; *D. (D.)*, at para. 13). The harm to parents' relationship with their children can also be profound. For instance, children can react to the sexual violence by shutting their parents out of their lives (*Rafiq*, at para. 40). Parents and caregivers may also bear the financial, personal, and emotional costs of helping their children recover and cope with emotional and behavioural challenges (see *D. (D.)*, at paras. 11-13). In the words of one mother of a child victim, the sexual violence "has taken many years from my son's life and I know this will hurt me for the rest of my life" (*D. (D.)*, at para. 11).
- [97] In sum, the sentence imposed for sexual offences against children must reflect the Court's findings in Friesen. It must reflect the contemporary understanding of sexual violence against children. It must recognize the wrongfulness and harmfulness of sexual violence

against children and the life-altering harms to the victim's personal autonomy, bodily integrity, sexual integrity, dignity, and equality that often flow from sexual violence. In short, the sentence must be commensurate with the gravity of sexual offences against children. As noted in Friesen:

- [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, [2000] 2 S.C.R. 90, at para. 35). We thus offer some guidance on how courts should give effect to the gravity of sexual offences against children. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.
- [93] And in *Z.K.* at paras. 36-48, Justice Duncan comprehensively reviewed and addressed the purposes and principles of sentence applicable in the context of sentencing in cases involving sexual offending against children. In particular, Duncan J. addressed proportionality, stating:
- [43] When applying the principles of proportionality, sentencing judges must take into account the wrongfulness and harmfulness of sexual offences against children which impact both the gravity of the offence and the degree of responsibility of the offender (at para. 75). Sentencing judges must also impose sentences that are actually commensurate with the gravity of sexual offences against children, rather than simply stating the offences are serious (at para. 76).
- [44] The degree of responsibility of the offender must not be discounted by relying on outdated stereotypes that minimize the harmfulness or wrongfulness of sexual violence against children:
- [88] Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child. In assessing the degree of responsibility of the offender, courts must take into account the harm the offender intended or was reckless or wilfully blind to (*Arcand*, at para. 58; see also *M. (C.A.)*, at para. 80; *Morrissey*, at para. 48). For sexual offences against children, we agree with *Iacobucci J.* that, save for possibly certain rare cases, offenders will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child (*Scalera*, at paras. 120 and 123-24).

- [89] All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender -- the offender is treating the victim as an object and disregarding the victim's human dignity (see *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 45 and 48). As L'Heureux-Dubé J. reasoned in *L. (D.O.)*, "the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women" precisely because both forms of sexual offences involve the sexual objectification of the victim (p. 441). Courts must give proper weight in sentencing to the offender's underlying attitudes because they are highly relevant to assessing the offender's moral blameworthiness and to the sentencing objective of denunciation (*Benedet*, at p. 310; *Hajar*, at para. 67).
- [90] The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable (*R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 153). As L'Heureux-Dubé J. recognized in *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132, "As to moral blameworthiness, the use of a vulnerable child for the sexual gratification of an adult cannot be viewed as anything but a crime demonstrating the worst of intentions" (para. 31, quoting *R. v. L.F.W.* (1997), 1997 CanLII 10868 (NL CA), 155 Nfld. & P.E.I.R. 115 (N.L.C.A.), at para. 117, per Cameron J.A. ("*L.F.W. (C.A.)*"). Offenders recognize children's particular vulnerability and intentionally exploit it to achieve their selfish desires (*Woodward*, at para. 72). We would emphasize that the moral blameworthiness of the offender increases when offenders intentionally target children who are particularly vulnerable, including children who belong to groups that face discrimination or marginalization in society.
- [45] At the same time, a sentencing judge must not overlook factors that may reduce an offender's moral culpability, as in the case of cognitive limitations, or where the principles in *Gladue* may have a mitigating effect on an offender's moral blameworthiness. There are no such factors present in *Z.K.*'s personal circumstances.
- [46] The Court in *Friesen* noted that Parliament has been steadily increasing sentences for sexual offences against children since 1987 and that to respect those increases:
- [100] courts should generally impose higher sentences than the sentences imposed in cases that preceded the increases in maximum sentences. As *Kasirer J.A.* [as he then was] recognized in *Rayo* in the context of the offence of child luring, Parliament's view of the increased gravity of the offence as reflected [TRANSLATION] in the increase in maximum sentences should be reflected in "toughened sanctions" (para. 175; see also *Woodward*, at para. 58). Sentencing judges and appellate courts need to give effect to Parliament's clear and repeated signals to increase sentences imposed for these offences.

- [47] Another reason why an upward departure from precedents may be required is that the understanding of the gravity and harmfulness of sexual offences against children has deepened and even more recent precedents may be treated with caution if they simply follow more dated precedents that inadequately recognize the gravity of sexual offences against children (at para. 110 of Friesen).
- [48] Sexual offences against children should generally be punished more severely than sexual offences against adults (at para. 107). Upper-single and double-digit penitentiary sentences should be neither unusual nor reserved for rare or exceptional cases (at para. 114).
- [94] I adopt the review of the overarching principles engaged in sentencing for sexual offences against children as articulated by both Justices Devlin and Duncan. These principles apply in the sentencing of T.A.P.
- [95] Friesen makes it clear that denunciation and deterrence are the primary objectives of sentencing for sexual offences against children, given the wrongfulness of such offences and the serious physical and psychological harm they cause. The Supreme Court of Canada explained that denunciation embodies the communicative and educative role of the law. Denunciation reflects the fact that Canadian criminal law is a system of values. Where a denunciatory sentence is imposed, it represents the condemnation of offenders whose offences have encroached on society's basic code of values. Such expressions of approbation instill the basic set of communal values shared by all Canadians. The protection of children is one of the most basic values of Canadian society: Friesen at paras. 101-105.
- [96] Sexual assault of a child is a crime that is so abhorrent to Canadian society that society's condemnation of those who commit such offences must be communicated in the clearest of terms: Friesen at para. 105.
- [97] As noted earlier, the primacy of the objectives of denunciation and deterrence have now been codified in s. 718.01 of the Code, which came into effect in September 2019.
- [98] Of course, the objectives of rehabilitation and restraint are not to be ignored. They, too, inform the analysis. Rehabilitation relates to the idea that the offender has been able to change their personal circumstances towards ensuring they will not reoffend in the future. Although the objective of rehabilitation cannot be discounted or ignored where there is evidence that it exists, in some serious cases where denunciation and deterrence are the primary objective, rehabilitation may be ascribed a reduced weight in the calculus of determining an appropriate sentence.
- [99] I will conclude this review of the principles of sentencing by returning to the fundamental principle of proportionality.
- [100] In *R. v. Pham*, 2013 SCC 15, the Supreme Court of Canada discussed proportionality and its interplay with the sentencing objectives and other principles as follows:

- [7] LeBel J. explained proportionality as follows in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37:

Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

- [8] In addition to proportionality, the principle of parity and the correctional imperative of sentence individualization also inform the sentencing process. This Court has repeatedly emphasized the value of individualization in sentencing: *Ipeelee*, at para. 39; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 21; *R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at para. 92. Consequently, in determining what a fit sentence is, the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(a) of the Criminal Code), as well as objective and subjective factors related to the offender's personal circumstances.

- [101] The Supreme Court of Canada emphasized this again in *R. v. Lacasse*, 2015 SCC 64 at para. 53, instructing sentencing judges that proportionality is to be determined both on an individual basis (i.e. in relation to the offender themselves and to the offence committed), as well as by comparison with sentences imposed for similar offences committed in similar circumstances. The concept of individualization and parity of sentences must be reconciled for a sentence to be proportionate.

. . .

- [105] The majority in *Parranto* also provided a reminder that proportionality is the primary animating principle, while parity and individualization are secondary principles which inform the proportionality assessment: at paras. 9-12, and 105. The gravity of the offence may be constant, but the individual offender varies. Thus, the question in sentencing is: does the sentence reflect the gravity of the offence, the degree of responsibility of the offender, and the unique circumstances of each case? Sentencing remains an individualized process and so parity is secondary to proportionality: *Parranto* at paras. 9, 38, and 205.

Joint Submissions

- [53] As I have said, the Crown and defence have made a joint submission that T.C.S.T. be sentenced to three years' imprisonment. As this is a joint submission, the principles enumerated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, establish the analytical framework that is applied in determining whether a sentencing judge will accede to a joint submission. A joint submission is when the Crown and defence agree to

recommend a particular sentence to the judge in exchange for the accused waiving their right to a trial by entering a plea of guilty to an offence.

- [54] Both sides carefully weigh the risks of taking the charges to trial, as well as a host of other factors, and determine that the certainty of resolution of a case is preferred. As Justice Moldaver, writing for the Court, noted in *Anthony-Cook* at para. 1, "[r]esolution discussions between Crown and defence counsel are not only commonplace in the criminal justice system, they are essential."
- [55] It is an accepted and entirely desirable practice for counsel to agree to a joint submission on a sentence in exchange for a guilty plea. Agreements of this nature are vitally important to the well-being of our criminal justice system, as well as our justice system at large. They bring certainty to the proceedings for both sides. They ensure a conviction for the Crown. They eliminate the uncertainty and risk of proceeding to trial, and they minimize the stress and numerous costs associated with taking matters to trial. Joint submissions also play a vital role in contributing to the smooth and efficient administration of justice.
- [56] Guilty pleas on a joint submission assist in preserving the all too scarce resources of the justice system and thereby permit those resources to be deployed elsewhere to be used for other equally pressing matters: *Anthony-Cook* at paras. 1, 25, 35-40.
- [57] Indeed, as Moldaver J. noted in *Anthony-Cook* at para. 40, "our justice system would be brought to its knees, and eventually collapse under its own weight" without joint submissions.
- [58] Given the critical importance of joint submissions to the proper functioning of the justice system, counsel must have a high degree of confidence that they will be accepted: *Anthony-Cook* at para. 41.
- [59] In light of the benefits of joint submissions and the need for certainty, a sentencing judge's ability to refuse to follow a joint submission is very circumscribed.
- [60] In the decision of *Anthony-Cook*, the Supreme Court directed that sentencing judges should only depart from joint submissions where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. As Moldaver J. wrote for the Court:
- [34] In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold -- and for good reason, as I shall explain.

[61] Here the parties have jointly recommended a sentence for T.C.S.T. As explained in *R. v. Manca*, 2019 BCCA 280 at para. 29:

The principles governing joint submissions are well established. Where the Crown and defence agree to recommend a particular sentence in exchange for a guilty plea, the sentencing judge may only depart from the recommendation where the "proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest" [citations omitted].

[62] Thus, a sentencing judge cannot simply do what she wants or accede to public sentiment. She must operate within fairly circumscribed parameters. A joint submission arrived at through negotiations between senior and responsible counsel, who are thoroughly familiar with all the issues in the case and have considered the implications of the guilty plea and the impact of the sentencing, including its impact on the repute of the administration of justice, is entitled to considerable deference and is not to be lightly rejected: *R. v. Russell*, 2013 BCSC 697 at para. 4.

Relevant Authorities from the Jurisprudence

[63] In support of the joint submission, counsel provided the Court with a number of cases. I will not detail the facts of those cases for the purposes of my reasons for sentence or canvass the personal antecedents of the offenders that inform the length of the sentences imposed in those cases. Suffice to say Crown counsel fairly reviewed the authorities provided and noted the similarities and differences between those cases and the one before me.

[64] Defence counsel took no issue with the authorities provided.

[65] The decisions relied upon to support the joint submission include: *R. v. P.R.J.*, 2023 BCCA 169; *R. v. C.C.H.*, 2020 BCCA 162; *R. v. Couch*, 2022 YKTC 40; *R. v. F.M.*, 2020 BCSC 1884; *R. v. W.G.L.*, 2020 NSSC 323. These cases accurately set out the range of sentence for sexual assaults committed in similar circumstances and support the proposed sentence of three years' imprisonment.

Analysis

The Analytical Framework Established by Friesen

[66] In *Friesen*, the Supreme Court of Canada established an analytical framework to guide sentencing judges in their determination of a fit and appropriate sentence for sexual offences against children. While the Court described the framework as containing significant factors to consider, they noted their comments are neither a checklist nor an exhaustive set of factors: *Friesen* at para. 121.

[67] These factors are considered below.

(a) Likelihood to Reoffend

- [68] At paras. 122 to 124 of Friesen, the Court addressed the issue of the offender's likelihood to reoffend. Where there is an increased likelihood of reoffending, the imperative of preventing further harm to the public calls for emphasis on the sentencing objective of separating the offender from society, as set out in s. 718(c) of the Code. A related and equally important consideration is the fact that the objective of rehabilitation cannot be overlooked and should be encouraged, as this is an important part of protecting the public.
- [69] In this case, I have the expert opinion of Dr. Bartel that assesses T.C.S.T. as being at a low risk to reoffend sexually. Significant to Dr. Bartel was the fact that T.C.S.T. voluntarily ceased offending and did not return to such behaviour in the five-year period Z.K.L. continued to live in the family home until T.C.S.T.'s arrest in November 2021.
- [70] In my view, the risk assessment is a significant mitigating factor in this case, as is T.C.S.T.'s potential for rehabilitation. He has been actively engaged in counselling with Dr. Dassinger and is committed to continuing with that counselling. This bodes well for T.C.S.T.'s reintegration into the community and ultimately the protection of the public.

(b) Abuse of a Position of Trust or Authority

- [71] At paras. 125 to 130 of Friesen, the Court refers to the spectrum of trust relationships. The closer the relationship and the higher the degree of trust between the child and the offender, the greater the likelihood the child will suffer more harm from the sexual violence. The abuse of a position of trust increases both the harm to the victim and the gravity of the offence. It may inhibit children from reporting abuse, particularly where the perpetrator lives with the victim and is a parent or caregiver. The abuse of a position of trust increases the offender's degree of responsibility and enhances their moral blameworthiness.
- [72] All things being equal, the abuse of a position of trust to commit a sexual offence against a child should result in a lengthier sentence than where an offender is a stranger to the child. In this case, T.C.S.T. repeatedly abused his stepdaughter in her own home while he was instructing her in tai chi.
- [73] The statutory aggravating factor enumerated in s. 718.2(a)(iii) of the Code, which provides "evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim", is directly engaged in this case. Z.K.L. was T.C.S.T.'s stepdaughter.
- [74] Significantly, in abusing his position of trust, T.C.S.T. did so within the confines of the family home, a place where Z.K.L. should have been safe, not exploited. Compounding this point is the fact that T.C.S.T. committed the offences while instructing Z.K.L. in tai chi.

(c) Duration and Frequency of the Abuse

- [75] At paras. 131 to 133 of Friesen, the Court notes that the frequency and duration of sexual violence against a child can significantly increase the harm to the victim. The immediate harm is multiplied or compounded by the number of the assaults committed. Long-term

emotional and psychological harm is also compounded where the sexual violence is repeated and prolonged. This factor further increases an offender's moral blameworthiness, as additional harm to the victim is a reasonably foreseeable consequence of multiple violations of the victim's physical and sexual integrity.

[76] As Chief Justice Wagner and Justice Rowe noted in Friesen:

[133] In sum, sexual violence against children that is committed on multiple occasions and for longer periods of time should attract significantly higher sentences that reflect the full cumulative gravity of the crime. Judges cannot permit the number of violent assaults to become a statistic. Each further instance of sexual violence traumatizes the child victim anew and increases the likelihood that the risks of long-term harm will materialize. Each further instance shows a continued and renewed choice by the offender to continue to violently victimize children. As Abella J.A. (as she then was) wrote in Stuckless (1998), where the offender has committed numerous assaults, the court cannot shy away from assessing the full dimensions of the wrong but must give effect to the "staggering" and "systematic" nature of the sexual violence in the sentence imposed (p. 116).

[77] In the case at bar, the offending occurred over a number of months, sometimes once or twice a week, during tai chi instruction, when T.C.S.T. was at home. As such, the offending was not an isolated incident or a momentary lapse in judgment on the part of T.C.S.T. As the adult in a position of trust and authority, he chose to renew and continue his offending each time he sexually violated Z.K.L. This elevates his moral blameworthiness.

[78] Related to duration and frequency of the abuse is the aggravating fact that there were multiple acts of sexual touching and interference with Z.K.L., as outlined in para. 18 of the admissions of fact.

(d) Age of the Victim

[79] Another factor outlined in Friesen is the age of the victim, which can be a significant aggravating factor: see paras. 134-136.

[80] Section 718.2(a)(ii.1) of the Code also recognizes this as a statutory aggravating factor: "evidence that the offender, in committing the offence, abused a person under the age of eighteen years".

[81] In Friesen, the Court noted the increased vulnerability of children and the wrongfulness of sexual predations committed upon them. The age of the victim is a significant aggravating factor, here a 12- to 13-year-old girl, and as the Court noted in Friesen, sexual violence committed upon adolescent girls is associated with an increased risk of a number of collateral harms, including lowered self-esteem, suicide, and substance abuse: see Friesen at paras. 65, 134-136.

- [82] A further statutory aggravating factor present in this case also engaged under this heading is found in s. 718.2(a)(iii.1), which provides "evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation".
- [83] I have already outlined earlier in these reasons that I accept and have found that T.C.S.T.'s offending against Z.K.L. has had a significant negative impact upon Z.K.L. and her family.
- (e) Degree of Physical Interference
- [84] In Friesen at paras. 137 to 147, the Court analyzed the jurisprudence that appeared to create a hierarchy of types of sexual offending with penetrative acts as the most serious, and less physically invasive acts lower on this scale. Such an approach was eschewed in Friesen at para. 146.
- [85] To be sure, the degree of physical interference is recognized as an aggravating factor, but the Court warned against placing undue emphasis on the type of physical interference at the expense of the psychological harm caused by less physically invasive acts. Mercifully, while T.C.S.T. did not engage in more invasive penetrative acts with Z.K.L., that does not diminish the psychological harm occasioned by the acts he did engage in with her.
- [86] As the Court noted in Friesen:
- [144] Specifically, we would strongly caution courts against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation. There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be [TRANSLATION] "relatively benign" (see *R. v. Caron Barrette*, 2018 QCCA 516, 46 C.R. (7th) 400, at paras. 93-94). Some decisions also appear to justify a lower sentence by labeling the conduct as merely sexual touching without any analysis of the harm to the victim (see *Caron Barrette*, at paras. 93-94; *Hood*, at para. 150; *R. v. Iron*, 2005 SKCA 84, 269 Sask.R. 51, at para. 12). Implicit in these decisions is the belief that conduct that is unfortunately referred to as "fondling" or [TRANSLATION] "caressing" is inherently less harmful than other forms of sexual violence (see *Hood*, at para. 150; *Caron Barrette*, at para. 93). This is a myth that must be rejected (*Benedet*, at pp. 299 and 314; *Wright*, at p. 57). Simply stating that the offence involved sexual touching rather than penetration does not provide any meaningful insight into the harm that the child suffered from the sexual violence.
- [87] There are two other aggravating factors that exist in this case. First, T.C.S.T. told Z.K.L. not to tell her mother about the activity: see *R. v. Josephson*, 2021 BCSC 1947 at para. 20; *Friesen* at para. 67. Second, as noted previously, the offending conduct took place in the family home, a place where a child should expect privacy, safety, and respect for her personal autonomy and physical and sexual integrity: see *Friesen* at paras. 66, 178; *T.A.P.* at para. 160(1).

Mitigating Circumstances

- [88] There are six mitigating circumstances in this case. First and most significantly is T.C.S.T.'s early guilty plea, which is a strong indicator of his remorse and acceptance of personal responsibility. As T.C.S.T. indicated through his counsel early in the process that he intended to plead guilty, he has spared Z.K.L. the anxiety and significant stress that children and victims experience in preparing for and testifying at trial, as noted in *R. v. F.(W.J.)*, [1999] 3 S.C.R. 569 at paras. 13-14, 1999 CanLII 677 and in *R. v. Levogiannis*, [1993] 4 S.C.R. 475 at 486(j)-487(a), 1993 CanLII 47.
- [89] By his guilty plea, T.C.S.T. has also spared the all too limited resources of the Court. T.C.S.T.'s guilty plea also is part of the indicia of his reduced future risk level.
- [90] The second mitigating factor is the absence of a criminal record. I note, however, that this is of limited weight in sexual offences that involve a breach of trust: see *R. v. R.M.*, 2019 BCCA 409 at paras. 17, 22-23; T.A.P. at paras. 146-149.
- [91] Although the significance of the absence of a criminal record is attenuated, as I noted in T.A.P., it should not and will not be completely discounted.
- [92] The third mitigating factor is that T.C.S.T. has had no issues while he has been on bail since November 2021. While his conditions of release were not onerous in terms of a curfew or house arrest, it has been restrictive in terms of no contact with his son since arrest: see T.A.P. at paras. 151-152.
- [93] The fourth mitigating factor, albeit related to the first, is T.C.S.T.'s consistent, profound, and genuine expression of remorse, both to the Court and in his candid interview with Dr. Bartel.
- [94] The fifth mitigating factor is T.C.S.T.'s long history of gainful employment and considerable commitment to volunteerism and philanthropic support of organizations in his community: see T.A.P. at para. 151.
- [95] The sixth mitigating factor is that T.C.S.T. has been professionally assessed as presenting a low risk to sexually reoffend, as outlined in Dr. Bartel's report.
- [96] Although not mitigating circumstances, there are two other points to be considered in relation to T.C.S.T. First, at 68 years old, he is not a young man. He is in poor physical and mental health, as outlined previously. His physician, Dr. Chang, opines that a term of imprisonment will negatively impact T.C.S.T.'s chronic medical conditions and his mental health. Indeed, Dr. Bartel also expresses considerable concern about the psychological impact a custodial sentence will have on T.C.S.T.: see para. 32 of Dr. Bartel's report. Accordingly, I have no doubt that T.C.S.T.'s time in custody may well be more difficult than for a typical younger offender who is in good health.

- [97] The second point related to T.C.S.T.'s personal circumstances are the collateral consequences he has suffered thus far and likely will suffer in the future.
- [98] As Mr. Peck so eloquently stated, this case is a crucible for what grief can be wrought by eight to nine months of serious misconduct in an otherwise unblemished life.
- [99] T.C.S.T. was arrested and held in custody overnight. He has been bound by conditions of release that include no contact with his young son for in excess of 20 months. His business has declined as a result of these charges, and he now faces a civil lawsuit in respect of his offending. As a result of his guilty plea in this case, it is very likely that he will be required to pay damages in the civil case.

Discussion

- [100] The issue the Court must address in this case is whether it ought to accede to the joint submission and impose the proposed sentence of three years' imprisonment. In *R. v. McKnight*, 2021 BCSC 2542, I addressed the parameters of the law on joint submissions, stating:
- [39] As noted earlier in these reasons, the Supreme Court of Canada's decision in *Anthony-Cook* provides clear direction to sentencing judges on the law as to how joint submissions are to be viewed; the test to be applied if the judge considers departing from the joint submission; and, if the judge decides that the joint submission cannot be endorsed, the process to be followed before rejecting the joint submission. The decision in *Anthony-Cook* establishes a high threshold for rejecting a joint submission, namely: whether the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. As summarized in *Anthony-Cook* at para. 34, determining that the high threshold for rejecting a joint submission has been met signifies the court is satisfied that the submission is:
- [34] . . . so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. . .
- [40] If a joint submission appears to be unduly lenient or unduly harsh, the sentencing judge is not obliged to accept it: *Anthony-Cook* at para. 25. However, as sentencing judges are only rarely permitted to depart from joint submissions, there is a corollary obligation upon counsel to ensure that they amply justify their positions on the facts of the case as presented in open court.
- [41] In light of the potentially contentious nature of a joint submission, at paras. 51-53 and 58-60 the decision in *Anthony-Cook* provides guidance for sentencing judges where the joint submission raises concern:

- i. Sentencing judges should approach the joint submission on an "as-is" basis," and the public interest test applies whether the judge is considering varying the proposed sentence or adding something to it: Anthony-Cook at para. 51;
- ii. Sentencing judges should apply the public interest test when they are considering 'jumping' or 'undercutting' a joint submission: Anthony-Cook at para. 52;
- iii. The greater the benefits obtained by the Crown, and the more concessions made by the accused, the more likely it is that the sentencing judge should accept the joint submission, even though it may appear unduly lenient: Anthony-Cook at para. 53;
- iv. If the sentencing judge is not satisfied with the sentence proposed, the judge should notify counsel of her concerns and invite further submissions, including the possibility of allowing the accused to withdraw their guilty plea: Anthony-Cook at para. 58;
- v. If the sentencing judge's concerns about the joint submission are not alleviated, the judge may allow the accused to apply to withdraw [their] guilty plea: Anthony-Cook at para. 59; and
- vi. Finally, sentencing judges should provide clear and cogent reasons for departing from the joint submission: Anthony-Cook at para. 60.

[101] Bearing these principles in mind, I note the following.

[102] First, I am satisfied that the cases that counsel have provided in support of the joint submission delineate that the proposed sentence is properly within the accepted range of sentences for these offences.

[103] Second, and of critical importance here, is the fact that the joint submission as to sentence in this case clearly represents an agreement negotiated and reached by extremely competent senior and experienced counsel, who have considered the effect of the joint submission from all perspectives, including the impact it will have on the repute of the administration of justice: Russell at para. 4.

[104] Counsel have outlined in brief compass the risks that they weighed in their protracted discussions, including the strength of the Crown's case in an essentially "he said/she said" case. Related to this is the fact that the victim has been spared the anxiety and stress of testifying. The guilty plea also provides certainty, finality, and resolution to what could otherwise be a lengthy process with no guaranteed outcome.

[105] T.C.S.T.'s guilty plea has also saved many days of court time, a scarce resource at this point in time.

[106] Accordingly, the joint submission as to the sentence to be imposed represents a very carefully calibrated outcome in a case that seemingly had significant risks for both sides.

- [107] Third, in my view, the recommended sentence appropriately balances the aggravating and mitigating factors in this case, and reasonably seeks to ensure that the sentence imposed honours the overarching principle of sentencing; that the sentence is proportionate to the gravity of the offence and the degree of the responsibility of the offender.
- [108] Fourth, the proposed sentence properly reflects the principles of sentencing applicable to these offences, with primary emphasis on deterrence and denunciation, as mandated by the jurisprudence and ss. 718.01 and 718.04 of the Code.
- [109] Applying the test articulated in *Anthony-Cook*, I am not of the view that to impose the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. Further, I do not find that the sentence put forward in this joint submission is so unhinged from the circumstances of the offences and the offender that its acceptance would lead a reasonable and informed person, aware of all the relevant circumstances, including certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. I am of the view that such a reasonable and informed person would regard the present proposed disposition as one that reflects a properly functioning justice system founded on the fundamental principles of proof beyond a reasonable doubt and the presumption of innocence, and that takes into account the tough decisions required to be made by both the Crown and counsel for the accused in difficult situations such as the present one. Indeed, as the Ontario Court of Appeal noted in *R. v. Fuller*, 2020 ONCA 115:
- [16] A joint position on sentence following a guilty plea should only be rejected in rare cases because such positions are "vitally important to the well-being of our criminal justice system, as well as our justice system at large" (citation omitted).
- [110] The case at bar is a perfect example of that observation.
- [111] Before formally imposing sentence and the various ancillary orders that flow from this sentencing, I turn to T.C.S.T.'s application to be exempted from registration under SOIRA.

SOIRA Exemption

- [112] I have had the benefit of receiving the comprehensive and thoughtful written argument outlining in detail why the Court ought to conclude that T.C.S.T.'s s. 7 Charter right to liberty and security of the person would be violated if the mandatory SOIRA order was imposed. Counsel expanded upon this in oral submissions.
- [113] Consistent with his obligations as a local minister of justice and officer of the Court, as recently reiterated in *R. v. Kahsai*, 2023 SCC 20 at para. 55, Crown counsel fairly and properly is not strongly opposed to an exemption in this case. The Crown's position is informed by the comprehensive forensic psychological report from Dr. Bartel and T.C.S.T.'s guilty plea.

- [114] The development of the jurisprudence on this particular facet of sentencing is still in its nascent stages. However, counsel have provided several recent cases that outline the considerations that animate the analysis, including: *R. v. Hart*, 2023 BCSC 933; *R. v. C.R.J.*, 2023 BCSC 1151; *R. v. Riossi*, 2023 ONSC 3812; *R. v. Shokouh*, 2023 ONSC 1848; and *R. v. Cusick*, 2022 ONCJ 590.
- [115] Similar to the circumstances in *Hart* and *Riossi*, the Crown seeks a 20-year SOIRA order under ss. 490.012 and 490.13(2) of the Code. The order is mandatory and remains mandatory until the suspension of the declaration of invalidity in respect of the mandatory s. 490.012 registration from *R. v. Ndhlovu*, 2022 SCC 38 expires.
- [116] In *Hart*, Justice Skolrood, as he then was, noted the following in respect of SOIRA and the decision in *Ndhlovu*:
- [41] The SOIRA regime requires a registered offender to comply with reporting and disclosure requirements that the Supreme Court of Canada described as "numerous, invasive and extensive": see *R. v. Ndhlovu*, 2022 SCC 38.
- [42] In *Ndhlovu*, a majority of the court found that the mandatory registration requirements of SOIRA violated s. 7 of the Charter and that the violation could not be justified pursuant to s. 1. The Court suspended the declaration of invalidity of s. 490.012 for one year, and held that the declaration would apply prospectively. However, the Court noted that offenders who were subject to the mandatory requirements could apply to the Court for a Charter remedy. I note that the dissenting judges in *Ndhlovu* agreed that the mandatory lifetime registration requirement in s. 490.013(2.1) was unconstitutional, but disagreed that the mandatory registration requirement in 490.012 violated s. 7.
- [117] Like the circumstances of Mr. Hart, the parties agree that T.C.S.T. is caught by the mandatory registration requirement, hence his application for a s. 24(1) remedy for an exemption based on an alleged violation of his s. 7 Charter rights. Similar to Mr. Hart, T.C.S.T. relies on the majority decision in *Ndhlovu* to support his application. The majority reasons contain a detailed analysis of the Charter issues which, like Skolrood J., I need not repeat. The essence of the majority's findings in *Ndhlovu* is contained in paras. 6 to 8 of the judgment:

This appeal requires this Court to determine whether Parliament complied with the Canadian Charter of Rights and Freedoms when it chose to remove prosecutorial and judicial discretion from s. 490.012 and introduced, under s. 490.013(2.1), lifetime registration for offenders convicted of more than one designated sexual offence. Through s. 490.012, Parliament sought to capture information about offenders that may assist police prevent and investigate sexual offences. Similarly, s. 490.013(2.1) is designed to give police a longer period of access to information on offenders at a greater risk of reoffending.

Even when Parliament acts with a laudable purpose, it must still legislate in a constitutional manner and comply with the Charter. It failed to do so when it enacted ss. 490.012 and 490.013(2.1). These measures infringe the liberty interest under s. 7 of the Charter because registration has a serious impact on the freedom of movement and on the freedom to make fundamental choices of people who are not at an increased risk of reoffending over their lifetime.

Because the mandatory registration of those offenders who are not at an increased risk of reoffending does not assist police, it is inconsistent with the principle of fundamental justice against overbreadth. Mandatory and lifetime registration overshoot the mark: subjecting sex offenders who do not have an increased risk of reoffending to obligatory reporting requirements is not connected to Parliament's purpose of capturing information that assists police prevent and investigate sex offences. Requiring lifetime registration also goes too far and denies the rights of some individuals in a way that bears no relation to Parliament's objective.

[118] T.C.S.T. grounds his application in the observations of the majority in *Ndhlovu*, as stated at para. 140:

A declaration of invalidity is presumed to operate retroactively (*R. v. Albashir*, 2021 SCC 48, at paras. 34 and 38). However, in this case, a retroactive application of the declaration at the conclusion of the suspension could frustrate the compelling public interests that require a period of transition, creating uncertainty and removing the protection that justifies the suspension in the first place (paras. 46, 52 and 72). Specifically, a retroactive declaration would undermine the purpose of the suspension (i.e., ensuring high-risk offenders are registered on SOIRA for public safety). Moreover, a prospective declaration of invalidity would not unduly prejudice offenders who have been registered since 2011 but whose rights under s. 7 are still violated. Those offenders will be able to ask for a personal remedy pursuant to s. 24(1) of the Charter in order to be removed from the registry if they can demonstrate that SOIRA's impacts on their liberty bears no relation or is grossly disproportionate to the objective of s. 490.012.

[119] T.C.S.T. confines his exemption application to the overbreadth aspect of *Ndhlovu*. That is, he contends the evidence demonstrates that SOIRA's impacts on his liberty interests bears no relation to the objective of s. 490.012 of the Code.

[120] The objective of s. 490.012 of the Code was described in *Ndhlovu* as assisting police in preventing and investigating sexual offences: see *Ndhlovu* at paras. 68, 92.

[121] The Court in *Ndhlovu* explained why the deprivation of liberty created by mandatory registration is not in accordance with the principles of fundamental justice as follows:

[79] . . . As we explained, the purpose of mandatory registration is to capture information about offenders that may assist police prevent and investigate sex offences. Registering offenders who are not at an increased risk of reoffending bears no connection to this purpose. The provision is overbroad.

- [122] T.C.S.T. contends that the evidence establishes that he is not at an increased risk to reoffend, based both on Dr. Bartel's forensic psychological evaluation, which places him at a low risk to reoffend, and his personal circumstances. Indeed, counsel for T.C.S.T. argues that, given the offender's personal circumstances and Dr. Bartel's comprehensive forensic psychological assessment, T.C.S.T. is in the lowest category of persons likely to reoffend. Accordingly, counsel argues there is no basis to find that the inclusion of T.C.S.T. in the Sex Offender Registry would advance the objective of preventing or investigating sexual offences, yet registration would have a significant detrimental impact on T.C.S.T.'s liberty.
- [123] In both Hart and Shokouh, exemptions from registration were granted based on each of the offender's low risk to reoffend, and in Riossi, Justice Di Luca noted:
- [144] Since Ndhlovu, exemptions have been granted by several courts, relying upon s. 24(1) of the Charter, to excuse primarily low-risk offenders from the registration and reporting requirements, see *R. v. Shokouh*, 2023 ONSC 1848 at paras. 24-29; *R. v. Capot Blanc*, 2023 NWTTC 7 at para. 23; *R. v. Purcell*, 2023 SKCA 56 at paras. 108-109; *R. v. Cusick*, 2022 ONCJ 590 at para. 115; *R. v. Simailak*, 2022 NUCJ 39; *R. v. J.S.*, 2023 MBKB 26; *R. v. Addo-Binney*, 2023 ONSC 547; *R. v. Luis*, 2022 CM 4016; and *R. v. Levesque*, 2023 CM 2001.
- [124] In this case, the Crown does not take the categorical approach that was advanced in Hart. Instead, Crown counsel submits that if T.C.S.T. has satisfied his burden of establishing that his risk to reoffend is so low that his registration bears no relation to advancing the objectives of the SOIRA regime and that registering would have a negative impact on his liberty, then an exemption is warranted.
- [125] Bearing in mind all of the circumstances in this case, in particular the mitigating circumstances previously cited, and applying the principles from Ndhlovu, I find that requiring T.C.S.T. to register with the Sex Offender Registry pursuant to the Code would not advance the objective of the SOIRA regime. Moreover, registration would have a significant negative impact on T.C.S.T.'s liberty.
- [126] As such, I find that mandatory registration would violate his rights under s. 7 of the Charter. I am therefore prepared to grant a remedy under s. 24(1) of the Charter and exempt T.C.S.T. from registration. I reach this conclusion for the following reasons.
- [127] First, a SOIRA order would subject T.C.S.T. to continuous disclosure and monitoring requirements for 20 years which, given his age, would continue well through his eighties. As noted, the majority in Ndhlovu at para. 5 described these requirements as "numerous, invasive and extensive".
- [128] Second, T.C.S.T.'s personal circumstances and characteristics support a finding that there is no increased risk of him reoffending. He is a first-time offender with no prior arrests or criminal charges. He is 68 years old and has led a largely prosocial lifestyle that includes raising two families, extensive education, and a successful professional career as a consultant in traditional Chinese practices of feng shui and fortune telling.

- [129] Third, T.C.S.T. has experienced significant adverse consequences as a result of the criminal proceedings, including the loss of his relationship with his partner, the loss of his relationship with his young son, a decline in his physical and mental health, and a diminishment of his business and professional reputation.
- [130] Fourth, T.C.S.T. has been assessed by Dr. Bartel as being a low risk to reoffend sexually. Both psychometric assessment tools administered were largely devoid of known and accepted risk factors for T.C.S.T.
- [131] Fifth, coupled with Dr. Bartel's opinion that T.C.S.T. presents as a low risk to reoffend sexually are the following additional indicia that support this assessment: T.C.S.T. stopped his offending and did not continue it, notwithstanding he lived in the same residence as the victim for five years; T.C.S.T. has expressed profound remorse and has accepted responsibility for his offending through his guilty plea; and T.C.S.T. has engaged in weekly counselling with Dr. Dassinger since May 2022, and is committed to continuing this counselling.
- [132] I find T.C.S.T. to be no different than Mr. Hart or Mr. Shokouh in terms of the risk to reoffend. In Shokouh, Justice Monahan noted:
- [27] Given that Mr. Shokouh is at low risk to reoffend, he is in essentially the same position as was Mr. Ndhlovu. As such, his registration under the SOIRA is unlikely to ever prove useful to police in investigating or preventing offences of this nature in the future. I therefore conclude that requiring him to register under the SOIRA is overbroad on precisely the same basis as in Ndhlovu, since it subjects him to onerous reporting requirements that do not further the purposes underlying the enactment of the SOIRA. This deprivation is not minimally impairing of his Charter rights since there is a more carefully tailored basis upon which to determine whether he should be required to register under SOIRA, namely, the individualized risk assessment provided by Dr. Ramshaw.
- [28] I further find that granting Mr. Shokouh an individual remedy under s. 24(1) would not undermine the purposes of suspending the s. 52(1) declaration. The court suspended the declaration of invalidity in Ndhlovu because, without the suspension, there would have been no way of ordering the registration of high-risk sex offenders under the SOIRA. Granting a low-risk offender such as Mr. Shokouh an exemption from the suspension of the declaration of invalidity thus would not undermine the Supreme Court's purpose for suspending the declaration.
- [133] These conclusions are equally apposite to T.C.S.T.'s circumstances.

Disposition on SOIRA Exemption

- [134] T.C.S.T.'s application for an individual remedy pursuant to s. 24(1) of the Charter, exempting him from the Ndhlovu suspension of the declaration of invalidity of s. 490.012 of the Code is granted. I declare he is not required to register under SOIRA.

[135] I turn now to the disposition in this case.

[136] Mr. [T.] would you please stand. Thank you.

[137] For the offence of sexual assault in Count 3, I sentence you to three years' imprisonment. You may have a seat. I am now going to address the -- you can sit down now. I am just going to address the ancillary orders.

Ancillary Orders

[138] I am now going to address the remaining ancillary orders sought by the Crown. The defence took no issue with these ancillary orders.

[139] The first order is the weapons prohibition order under s. 109(2) of the Code. The weapons prohibition is mandatory.

[140] Pursuant to s. 109(2) of the Code, T.C.S.T. is prohibited from possessing:

- a) any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition, and explosive substance for a period of ten years from his release; and
- b) any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

[141] Second, sexual assault is a primary designated offence pursuant to s. 487.04 of the Code. Accordingly, pursuant to s. 487.051(1) of the Code, there will be an order in Form 5.03 authorizing the taking of samples of bodily substances from T.C.S.T. for the purposes of forensic DNA analysis and inclusion in the National DNA Data Bank.

[142] Third, pursuant to s. 161 of the Code, there will be a prohibition order of five years' duration. Under the terms of this order, T.C.S.T. is prohibited from:

- a) being within 200 metres of any dwelling house where Z.K.L. ordinarily resides or any place of employment or study that Z.K.L. attends; and
- b) seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming a volunteer in any capacity that involves being in a position of trust or authority towards persons under the age of 16 years.

[143] Fourth, pursuant to s. 743.21(1) of the Code, T.C.S.T. is to have no contact with Z.K.L. or X.M. during the custodial period of his sentence. There is an exception to this no-contact order. The exception is as follows: indirect contact is permitted with Z.K.L. through or in the presence of a lawyer who has been given a copy of this order, for the purposes related to facilitating the civil law proceeding Z.K.L. has initiated against T.C.S.T.

- [144] Although the imposition of the victim fine surcharge pursuant to s. 737 was not contested, respectfully I decline to order that T.C.S.T. pay a victim fine surcharge, in light of the fact that the provision in place at the time the offences were committed was found to be unconstitutional in *R. v. Boudreault*, 2018 SCC 58.
- [145] Fifth, as T.C.S.T. is subject to a period of imprisonment for greater than two years, pursuant to s. 743.2 of the Code, I order that a copy of these reasons for sentence, as well as a copy of the Exhibits 1 through 4 from the sentencing hearing be forwarded to the Correctional Services of Canada.
- [146] Finally, I wish to add as a post script to these reasons for sentence the following points. In his report, Dr. Bartel made a number of recommendations and observations, including the following concern:
- [32] Given [T.C.S.T.]'s ongoing suicidal ideation, I am concerned about the increased risk for suicide or self-harm, particularly in the first several weeks of incarceration. Thus, I recommend he be classified or flagged as at risk for suicide upon entry into custody which will hopefully trigger greater supervision and monitoring as well as mental health support and intervention.
- [147] In light of Dr. Bartel's concern, echoed to some degree by Dr. Chang, I would recommend, indeed urge, in the strongest possible terms that the assistant commissioner of the Correctional Service of Canada and warden of whichever B.C. correctional institution T.C.S.T. first enters, classify or flag him as at risk for suicide and ensure greater supervision and monitoring, as well as mental health support for T.C.S.T. as he adjusts to life in a custodial setting.
- [148] I understand that a judicial recommendation is usually given not much weight, but I wish to place that concern on the record.
- [149] [T.C.S.T.] you have had a long hard journey to today, and you still have some length in the road yet to travel. While you may experience challenges, difficulties, and setbacks, hopefully they will be no more difficult than where you have already journeyed through to get to today. Continue on your path of treatment and commitment to returning to the community as a fully-functioning prosocial businessman.
- [150] Good luck to you, [T.C.S.T.].
- [151] Is there anything else, counsel? Counts 1 and 2?
- [152] CNSL K. HENNESSY: Nothing from the Crown, thanks. Sorry?
- [153] THE COURT: Counts 1 and 2?
- [154] CNSL K. HENNESSY: Counts 1 and 2, the Crown directs a stay of proceedings.
- [155] THE COURT: Thank you. Mr. Peck, anything?

[156] CNSL R. PECK: No, thank you, My Lady.

[157] THE COURT: Thank you. All right, well, lastly, but definitely not least, I want to thank counsel for their professionalism and sensitivity in the conduct of this case. You have assisted the Court immeasurably with your extremely thoughtful and helpful submissions. It has been a true privilege to have you appear before me in this proceeding. Thank you so very much. We are adjourned.

"Ker J."

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