

CANADA / JUDGMENT

# R. v. Wiens

2025 BCCA 162

## COURT

British Columbia Court of Appeal

## DECIDED

21 May 2025

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2025 BCCA 162 R. v. Wiens

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Wiens,

2025 BCCA 162

Date: 20250521

Docket: CA49970

Between:

Rex

Respondent

And

Michael Allen Wiens

## Appellant

Restriction on Publication (rescinded): A publication ban was imposed pursuant to s. 486.4(2.1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of information that could identify the complainant. On December 20, 2023, the trial judge granted an application to rescind this publication ban pursuant to s. 486.51(3) of the Criminal Code. The publication ban no longer applies.

Corrected Judgment: The judgment was corrected on the cover page to include a publication notice on May 30, 2025.

Before:

The Honourable Mr. Justice Grauer

The Honourable Justice Donegan

The Honourable Justice Edelmann

On appeal from: An order of the Provincial Court of British Columbia, dated

May 29, 2024 (sentence) (R. v. Wiens, Surrey Docket 244777-1K).

Counsel for the Appellant:

R. Larmer

T.L. Barton

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

January 24, 2025

Place and Date of Judgment:

Vancouver, British Columbia

May 21, 2025

Written Reasons by:

The Honourable Justice Donegan

Concurred in by:

The Honourable Mr. Justice Grauer

The Honourable Justice Edelmann

Summary:

The appellant was sentenced to three years' imprisonment for sexually assaulting a friend in her home while she was unconscious. She was also ordered to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10 ("SOIRA") for 20 years. The appellant seeks leave to appeal her sentence. She says the judge erred by rejecting her claim of Indigeneity and thereby failed to meaningfully consider and apply Gladue principles in the sentencing analysis. The appellant also appeals from the SOIRA order, contending the judge predetermined that she would make the order, and that she failed to consider, or improperly applied, various statutory factors in refusing to grant her an exception from SOIRA compliance.

Held: Leave to appeal from sentence granted; appeal from sentence dismissed; appeal from SOIRA order dismissed. The judge did not reject the appellant's claim of Indigeneity. She considered relevant Gladue principles, but concluded they could play no meaningful role in the analysis because of the absence of any information upon which to evaluate the significance of the appellant's Indigenous identity and circumstances as an Indigenous person. The judge also did not err in ordering the appellant to comply with SOIRA. The judge did not predetermine the matter, properly considered all of the required factors and concluded the appellant had failed to establish an exception applied. There is no basis for appellate intervention in this case.

Reasons for Judgment of the Honourable Justice Donegan:

## Introduction

- [1] After a trial in the Provincial Court of British Columbia, the appellant was found guilty of sexually assaulting a long-time friend in her home while she was unconscious. The judge sentenced the appellant to three years' imprisonment. The judge also made an order, denying the appellant's application for an exception, requiring the appellant to comply with the requirements of the Sex Offender Information Registration Act, S.C. 2004, c. 10 ("SOIRA"), pursuant to s. 490.012(3) of the Criminal Code, R.S.C. 1985, c. C-46 for a period of 20 years (the "SOIRA Order").
- [2] As a preliminary matter, I note that since her trial, the appellant has indicated that she uses she/her pronouns, and, as did the judge at sentencing, I will do so throughout these reasons.
- [3] The appellant appeals from both the sentence and the SOIRA Order. In relation to the sentence, she contends the judge made a material error in principle by rejecting her claim of Indigeneity and thereby failed to meaningfully consider and apply the principles in *R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679 and the requirement in s. 718.2(e) of the Criminal Code. In respect of the SOIRA Order, the appellant alleges multiple errors involving the judge's failure to consider, or properly apply, certain required statutory factors.
- [4] For the reasons that follow, I would dismiss the appeal from both the sentence and the SOIRA Order.

## Background

### The offence

- [5] The events leading to the appellant's conviction are summarized in paras. 15-22 of the judge's reasons for sentence (indexed as Surrey Registry No. 244777-1K) (the "Sentencing Reasons"). The appellant and the victim were long-time friends. On February 2, 2021, they consumed the drug gamma-hydroxybutyrate ("GHB") together at the victim's home. The victim became so impaired by the drug that she fell while showering and soon lost consciousness.

- [6] The appellant sexually assaulted the victim during the time the victim was unconscious that night. The victim only became aware of this about a week later, when she was reviewing video recordings from her home's security system for another purpose. The recording from that night showed that the appellant assisted the victim, who was unable to walk on her own, from the bathroom to the sofa in the living room. As the victim lay unconscious on the sofa, the appellant wiped her unresponsive, limp and naked body with a towel, and then repositioned her so that her buttocks and genital area were facing toward the appellant. The appellant then digitally penetrated the victim's vagina. The video next showed the appellant moving closer to the victim's body, and the judge found that the appellant's penis penetrated the victim's vagina at this point, without using a condom. The victim remained unconscious during the entire encounter.
- [7] This crime, including the manner in which she learned of it, has had long-lasting and profound emotional, psychological and economic impacts on the victim.

### The sentencing hearing

- [8] At the hearing below, the Crown sought a sentence of three years' imprisonment, emphasizing the primacy of denunciation and deterrence, the gravity of the offence, the harm done to the victim, and the high moral blameworthiness of the appellant in committing the offence.
- [9] The defence advocated for a sentence of two years' imprisonment, relying primarily on the involvement of intoxicants and the presence of Gladue factors to reduce the appellant's moral responsibility in committing this offence. The defence acknowledged that there was limited information available regarding the appellant's Indigenous ancestry, but submitted that she had clearly suffered from intergenerational impacts of colonialism and systemic discrimination against Indigenous people.
- [10] The Crown also sought a number of ancillary orders, including an order pursuant to s. 490.012(3) of the Criminal Code obliging the appellant to comply with the requirements of SOIRA for a period of 20 years.
- [11] Section 490.012(3) of the Criminal Code provides that offenders convicted of designated offences such as sexual assault are required to comply with the provisions of SOIRA, unless a court is satisfied the offender has established either that: (a) there is no connection between the making of the order and the investigation or prevention of sexual crimes (the "no connection" exception); or (b) the impact of the order on the offender, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society (the "grossly disproportionate" exception). In other words, an order under s. 490.012(3) is presumptive, unless the offender establishes that one of the two exceptions applies. In this case, the appellant sought to establish the applicability of the "no connection" exception.

- [12] In determining whether the appellant had met her onus, the judge was required to consider a number of factors, enumerated in s. 490.012(4):
- (a) the nature and seriousness of the designated offence;
  - (b) the victim's age and other personal characteristics;
  - (c) the nature and circumstances of the relationship between the person and the victim;
  - (d) the personal characteristics and circumstances of the person;
  - (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
  - (f) the opinions of experts who have examined the person; and
  - (g) any other factors that the court considers relevant.
- [13] Both counsel made submissions in relation to these factors. The defence placed particular emphasis on information before the judge in relation to factors (d), relying on circumstances relevant to the appellant's marginalization; (e), referring to the lack of violence and sexual violence in the appellant's criminal history; and (f), the opinion expressed by an expert that the appellant posed a low risk for sexual offence recidivism. The defence also urged the judge to consider another factor said to be relevant to the analysis -- the appellant's acknowledgement of the harm she caused the victim, albeit limited by her position on the outcome of the trial.

#### Reasons for Sentence

#### **The appellant's circumstances**

- [14] Having presided over the trial, the judge had extensive knowledge of the circumstances of the offence. She had a recording of the crime. She also had considerable material related to the appellant's circumstances, including: (a) a pre-sentence report; (b) a psychological assessment; (c) information provided through the submissions of counsel; and (d) a Gladue report.
- [15] The appellant was 40 years old at the time of sentencing. The judge noted that the appellant was initially raised by her mother and stepfather in unstable and difficult circumstances that involved food insecurity, frequent arguments and substance misuse by her parents. The appellant was placed in foster care from age 12 to 19, suffering significant abuse and developing difficulties with substance misuse. The appellant also struggled with learning disabilities and symptoms related to attention deficit hyperactivity disorder (ADHD), leading to an early departure from high school.

- [16] The appellant's difficult circumstances continued into adulthood. These included: (a) periodic homelessness; (b) minimal and short-term employment; (c) substance misuse; (d) negative peer associations; and (e) criminality. At the time of sentencing, the appellant was in receipt of persons with disability benefits in relation to physical injuries from a motor vehicle accident, ADHD, and her learning disabilities.
- [17] The judge also took note of the appellant's lengthy criminal record, which the appellant attributed to her long-term substance misuse and an anti-social peer group. Having been convicted 40 times between 2004 to 2022, the appellant's criminality included various property, driving, and drug offences, as well as failing to comply with bail and probation orders. The judge also referred to the psychological assessment of Dr. Pritchard, who opined that the appellant poses a low risk for sexual violence in the future, but found (in light of her criminal record) a high need to evaluate her risk for general criminality.
- [18] The judge discussed the appellant's various family and social supports, including the appellant's biological father. Until the age of 23, the appellant was unaware that the man who raised her was not her biological father. When the appellant connected with her biological father, he informed the appellant that his own mother (the appellant's grandmother) was Indigenous: a member of the Mohawk people of Ontario. At the time of sentencing, the appellant expressed a desire to know more about her paternal Indigenous heritage, but very little was known about her biological father's upbringing, or his side of the family. The Gladue report writer could not reach the appellant's biological father and was therefore unable to obtain any information about this aspect of the appellant's personal circumstances.

### **Sentencing principles considered and applied by the judge**

- [19] The judge began by setting out all of the objectives and principles that properly inform the sentencing analysis, including its individualized nature and the fundamental nature of the proportionality principle found in s. 718.1 of the Criminal Code: Sentencing Reasons at paras. 43-50.
- [20] In identifying these objectives and principles, and contrary to the appellant's submissions on appeal, the judge specifically recognized the applicability of s. 718.2(e) of the Criminal Code, which requires a sentencing judge to 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 should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders": Sentencing Reasons at para. 50. As well as recognizing the applicability of this provision, the judge later instructed herself on the framework within which to consider it, as outlined in Gladue and R. v. Ipeelee, 2012 SCC 13, and as discussed in more recent decisions of this Court in R. v. Kehoe, 2023 BCCA 2, R. v. Hamer, 2021 BCCA 297 and R. v. Olson, 2023 BCCA 430: Sentencing Reasons at paras. 72-83.

- [21] Addressing specific issues raised by counsel, the judge next assessed how the appellant's intoxication at the time of the offence ought to be considered in the analysis. She then turned to consider the application of Gladue factors. The judge stated that she accepted the appellant's claim to be a person of Indigenous heritage, but ultimately concluded that Gladue factors could play no meaningful role in the analysis because of the absence of any information upon which she could evaluate the significance of the appellant's Indigenous identity and circumstances as an Indigenous person: Sentencing Reasons at paras. 76, 88-89. It is this aspect of the judge's analysis that grounds the appellant's sentence appeal.
- [22] The judge turned next to applying the sentencing principles to the case before her. She began with her conclusions on proportionality, finding both the gravity of the offence and the appellant's moral responsibility in committing it to be very high.
- [23] Regarding the gravity of the offence, the judge noted several aggravating factors, including that: (a) the appellant committed multiple, invasive sexual assaults; (b) upon an unconscious, vulnerable victim in her own home; (c) after having been invited into the victim's home as a trusted and safe companion; and (d) causing significant and lasting harm to the victim: Sentencing Reasons at paras. 90-91, 93, 97.
- [24] Regarding the appellant's moral responsibility, the judge found the appellant's motivation for committing the offence was sexual gratification, and that it involved a deep betrayal and violation of the trust of a vulnerable friend: Sentencing Reasons at paras. 92-93. Although the judge thoroughly considered potentially mitigating factors relevant to the appellant's moral blameworthiness, she ultimately concluded that there were none: Sentencing Reasons at para. 98. She considered the appellant's self-induced intoxication at the time of the offence was, "at best" a "neutral factor" (Sentencing Reasons at para. 64) and that the appellant's Indigeneity had no "great impact in the circumstances of this case" (Sentencing Reasons at para. 125).
- [25] Consistent with leading authorities in this area, the judge recognized that the objectives of denunciation and deterrence are "the paramount considerations" (Sentencing Reasons at para. 94, citing *R. v. G.M.*, 2015 BCCA 165 at para. 18) and the general range of sentence for this type of offence as two to six years' imprisonment (Sentencing Reasons at para. 96, citing *G.M.* at paras. 18, 22 and *R. v. Friesen*, 2020 SCC 9 at para. 115).
- [26] The judge also reviewed the sentencing authorities provided to her by counsel in support of their positions. She distinguished those provided by the appellant, generally on the basis that the significantly reduced moral culpability of those offenders (through the application of Gladue factors) was not present in this case.
- [27] Ultimately, after thorough analysis, the judge concluded that three years' imprisonment was a proportionate sentence: Sentencing Reasons at paras. 124-129.

## Reasons for the SOIRA Order

- [28] Following the imposition of sentence, the judge addressed the various ancillary orders sought, including the appellant's request to be excepted from the presumptive SOIRA Order. The judge determined that the appellant failed to meet her onus of establishing there was no connection between the making of the order and the investigation and prevention of sexual crimes. Although not argued by the appellant, the judge also considered the "grossly disproportionate" exception, and concluded it was not established either: Sentencing Reasons at para. 133.
- [29] In reaching these conclusions, the judge reasoned:
- [131] I have considered the nature and seriousness of the designated offence as described in these reasons. Ms. Wiens has an essentially unbroken adult criminal record or history starting in 2003. Ms. Wiens's probation officer characterized her as a well-known prolific offender. The Assessment indicates that Ms. Wiens currently poses a low risk for sexual violence in the future, that her motivation for the offending in this case was sexual gratification. The report also opines that given Ms. Wiens's criminal record, the need to evaluate her for risk of general criminality is high.
- [132] The defence says that while Ms. Wiens has a lengthy criminal history, there is no history of violent or sexual offending. They also submit, although Ms. Wiens disagrees with the conviction, she has acknowledged that Ms. Raven has suffered and feels hurt and betrayed by Ms. Wiens actions. They also submit that Ms. Wiens expressed regret that this occurred and that she will be careful with sexual interactions in the future, especially while under the influence.
- [133] The Pre-Sentence Report writer observed Ms. Wiens was not able to identify how her behaviour may have impacted the victim and she lacked knowledge regarding consent in the context of a sexual interaction. Given this, I am of the view that it is likely that requiring Ms. Wiens to register and report will assist the investigation and prevention of sexual crimes. I am satisfied that making the order would not have a grossly disproportionate impact on her privacy or liberty when balanced against the public interest in protecting society from sexual crimes.

## Appeal from Sentence

- [30] The highly deferential standard of review for appeals from sentence is well-known. An appellate court can only intervene to vary a sentence if the sentence is demonstrably unfit, or if the sentencing judge made an error in principle that had an impact on the sentence: *R. v. Lacasse*, 2015 SCC 64 at para. 11; *Friesen* at para. 26. Errors in principle can include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor: *Friesen* at para. 26.

- [31] The appellant contends the judge materially erred in principle by rejecting her claim of Indigeneity and by failing to meaningfully consider and apply Gladue principles flowing from s. 718.2(e) of the Criminal Code. I respectfully disagree, on both counts.

### **The judge did not reject the appellant's claim of Indigeneity**

- [32] There is no merit to the assertion that the judge rejected the appellant's claim of Indigeneity. The judge very clearly, and expressly, accepted that the appellant was a person of Indigenous heritage in the Sentencing Reasons. For example:

- [88] ... The factors outlined in the report are based on Ms. Wiens's difficult life growing up in a non-Indigenous household, being a foster child, and her own difficulties in adulthood. Ms. Wiens's indigeneity is based on her self-reporting, and while I accept her claim as a Mohawk person, more is needed. In the Pre-Sentence Report, Ms. Wiens attributed, again, her criminal lifestyle and offending to long-term substance misuse, negative peers and associates.

- [89] Based on the foregoing, I find there is no information to evaluate about Ms. Wiens's Indigenous identity and her circumstances as an Indigenous person. Therefore, while I accept Ms. Wiens's claim as a person of Mohawk heritage, I do not find that it has had a great impact on the circumstances of this case, given the seriousness of the charge and the vague connection of being an Indigenous person of the Mohawk people.

[Emphasis added.]

- [33] Not only did the judge accept the appellant's self-identification, she conducted a thorough evaluation of the significance of the appellant's Indigenous identity and her circumstances as an Indigenous person, as required in the Gladue analysis: Sentencing Reasons at paras. 65-89.
- [34] Despite this express language and thorough evaluation, the appellant urges us to conclude that the judge did not actually mean what she said. Pointing to remarks made by the judge at the hearing said to demonstrate the judge's "concern" about her claim to Indigeneity, the appellant asks us to conclude that the judge did not actually accept the claim, but rather only accepted that the appellant had made such a claim. For example, the appellant highlights where, at the hearing, the judge remarked on: (a) the timing of the appellant's assertion of Indigenous heritage (late in the proceedings); (b) the "ongoing issue in the justice system about individuals claiming Indigenous identity for the purpose of sentencing"; and (c) the fact that " anyone can say they're Indigenous If that's their claim, that's their claim ".
- [35] I find these submissions unpersuasive. When the comments of the judge identified by the appellant are placed in context, as they must be, it is clear the judge was not questioning the validity of the appellant's assertion of Indigeneity. Her remarks were made during the course of lengthier exchanges with the appellant's counsel where the judge was, quite properly, either: (a) exploring how she was to evaluate the significance of the appellant's

Indigenous identity and circumstances as an Indigenous person (as required in the Gladue analysis) in the absence of sufficient information to assist with this evaluation; or (b) endeavouring to correct counsel's misunderstandings about fundamental aspects of the Gladue analysis she was required to conduct.

[36] For example, the judge's "anyone can say they're Indigenous" remarks occurred during an exchange in which the appellant's trial counsel was advancing two erroneous propositions: that the appellant was required to "prove" her Indigeneity, and the judge was bound to simply "apply" the "factors" identified by the Gladue report writer, without conducting any of the necessary evaluation of the significance of the appellant's Indigenous identity and her circumstances as an Indigenous person.

[37] The transcript reveals that the judge was not only legitimately exploring and testing counsel's submissions -- she was also endeavouring to clarify counsel's misunderstandings in this regard. The judge's remarks occurred in the midst of this exchange:

CNSL T. BARTON: And this is the precise issue Your Honour was pointing out that we're faced with two key issues. First, whether -- or primarily whether Ms. Wiens is indeed Indigenous and the limited information that we have before the court either in support or opposition of that claim but nevertheless, if -- if Ms. Wiens is accepted to be Indigenous, the disconnection in and of itself, these courts all agree is a factor to be considered.

THE COURT: Well, Ms. Barton, I don't want to be misunderstood. I'm not saying -- what I've said is anyone can say they're Indigenous and the court isn't going to object to that. If that's their claim, that's their claim but it goes to the evidence of how that -- that identity goes to what has happened in their life. And the cases and Hamer speaks directly on point about that so I'm not -- I don't want to be taken as saying that I accept or not Ms. Wiens' claim. I accept the claim has been made so I -- I don't have an issue with that. I accept that disconnection is a result of the intergenerational issues that have gone on. I don't take issue with that but what Hamer tells us and what the Court of Appeal has told us on a number of occasions is -- I agree it's also a case-by-case basis, but it isn't just because someone says they're Indigenous that automatically Gladue factors should apply to them. I have to decide based on the evidence whether or not Ms. Wiens growing up and the factors that you set out in your -- in your written submissions have something to do with being Indigenous or not so that's what I have to answer.

[38] And then, a short time later, the judge tried again to correct counsel's misunderstandings:

CNSL T. BARTON: Right, and I've noted that so then the issue is whether or not Ms. Wiens is indeed Indigenous.

THE COURT: No, it's not.

CNSL T. BARTON: If it is accepted that she is Indigenous then the factors that are outlined apply.

THE COURT: Well, according to you but I have to decide that.

CNSL T. BARTON: Well, apologies, according to the Gladue writer.

THE COURT: Well, but -- can you take me there? This writer -- I guess what I'm having some difficulty with, Ms. Barton, is I think we're -- I'm not sure why we're belabouring the point. Ms. Wiens claims to be Indigenous, period. Then we move on from there but what the Court of Appeal has told us is yes, we have -- judges have to do the analysis which I'm going to have to do on whether or not the factors that are being claimed are actually Gladue factors or whether the function of Ms. Wiens' upbringing when she -- did know that she was Indigenous at least until the age of 23 and there's nothing in this report that suggests otherwise. Ms. Wiens' mother -- her mother doesn't speak about that. Nobody does except him -- her. Where did you want to -- the factors that you were pointing out are where?

**CNSL T. BARTON: I believe it's page 9 and 10. Yeah, page --**

THE COURT: I mean, the whole reason for these cases is just this dilemma is that we have individuals that the courts have to grapple with who claim Indigenous heritage and just because it's claimed doesn't mean Gladue factors automatically apply. That's the point I'm making.

[39] Read contextually, none of what the judge said during her exchanges with counsel shows a skeptical approach to, or a rejection of, the appellant's claim to Indigeneity. To the contrary, the judge's remarks at the hearing, consistent with her Sentencing Reasons, demonstrate a clear awareness that the court is not to "act as gatekeeper" of an offender's assertion of Indigenous identity (Sentencing Reasons at para. 76). There is no merit to the suggestion that the judge did not accept the appellant is Indigenous.

### **The judge did not fail to meaningfully consider and apply Gladue principles**

[40] I also conclude there is no merit to the assertion that the judge failed to meaningfully consider and apply Gladue principles. The judge's reasons demonstrate that she understood she was required to evaluate relevant information about the significance of the appellant's Indigeneity and her circumstances as an Indigenous person in the sentencing analysis (Sentencing Reasons at paras. 76, 89, citing Hamer at para. 117). Indeed, she devoted a significant portion of her reasons to what I see as a proper and careful evaluation of Gladue principles in the context of the Gladue-related information that was before her (Sentencing Reasons at paras. 65-88).

[41] The Gladue report provided the judge with information about the appellant's upbringing and life circumstances. The judge took this information into account, including the appellant's "difficult and troubled upbringing" in which she was subjected to sexual, emotional and psychological abuse (Sentencing Reasons at para. 85) and a variety of other negative experiences and circumstances of the appellant's life, including that she grew up in a non-Indigenous household, was in foster care, and struggled in almost all facets of her adult life (Sentencing Reasons at paras. 85, 88).

- [42] The Gladue report did not, however, contain information specific to the appellant's Indigenous identity and her circumstances as an Indigenous person, owing to the author's inability to obtain any information in that regard. The judge took what limited information the report contained into account, including that: (a) the appellant's mother and biological father had never been in a relationship; (b) the appellant had no relationship with her biological father in the first 23 years of her life; (c) the appellant's paternal grandmother was Mohawk, from Ontario; and (d) the appellant's biological father has not provided any details about his own upbringing, or about the appellant's grandmother.
- [43] As the judge noted, the Gladue report contained no information about the appellant's biological father or that side of her family, nor did it speak to potential intergenerational impacts of Canada's assimilationist policies upon the appellant. In these circumstances, the judge found that there was "no information to evaluate about the appellant's Indigenous identity and her circumstances as an Indigenous person", and that although she accepted "Ms. Wiens's claim as a person of Mohawk heritage", it did not have "a great impact on the circumstances of this case, given the seriousness of the charge and the vague connection of being an Indigenous person of the Mohawk people": Sentencing Reasons at para. 89.
- [44] As Justice Marchand, as he then was, held in *Kehoe*, "[t]he fact that an offender is Indigenous obliges a sentencing judge to consider Gladue principles but does not establish whether and how those principles will apply": at para. 49. The judge in this case carefully considered Gladue principles and their significance to the sentencing analysis. The paucity of evidence relating to the appellant's Indigenous heritage and identity (including about how and why she came to be disconnected from her heritage), led the judge to conclude that she could draw no significance from it in terms of the role it may have played in bringing the appellant before the court, in the assessment of her moral blameworthiness, or in any other part of her analysis. This conclusion was reasonably open to the judge and I see no error in principle here.
- [45] Nor am I persuaded by the appellant's argument that the judge failed to bring a proper awareness of the potential significance of the loss of Indigenous heritage to her analysis. Whether there is an appropriate nexus between an Indigenous offender, the loss of Indigenous heritage and their presence before the court cannot be assumed. It is a matter to be evaluated in the circumstances of each case. As Justice Harris held in *Olson*:
- [39] There is no ineluctable correspondence between Indigeneity, loss of Indigenous heritage, and criminality. Whether disconnection from Indigenous heritage has resulted in harm through, for example, the intergenerational transmission of a loss of positive and supportive community, is to be assessed in each case. This does not require, as is well established, proof of a causal connection, but, equally, the necessary nexus is not just an assumption (see *Kehoe* at para. 46, quoting *Hamer* at para. 117).

[46] The circumstances of this case are very similar to those in Olson. The appellant's connection to Indigeneity is remote and there is no evidence that disconnection from her heritage played a material role in her personal circumstances through the intergenerational transmission of harm. The judge's conclusion effectively mirrored that of this Court in Olson: that while the appellant had an unstable and dysfunctional upbringing and has exhibited behaviour common in some Indigenous youth whose lives have been harmed by intergenerational trauma arising out of our country's colonial history, what was missing in this case was a proper basis for concluding that a necessary nexus between the appellant's personal circumstances and disconnection from her Indigenous heritage played anything other than a "tenuous role" in bringing her before the court or affecting her moral culpability: Olson at para. 35. It follows, in my view, that it was open to the judge to conclude that she could not attach any great significance to Gladue factors in the sentencing analysis and she made no error in doing so.

[47] For all of these reasons, I would dismiss the appeal from sentence.

### **Appeal from the SOIRA Order**

[48] The appellant alleges the judge made multiple errors in not providing her with an exception from SOIRA registration, and seeks to have the order quashed. Specifically, she contends the judge erred by: (a) failing to consider her circumstances as required by s. 490.012(4)(d); (b) failing to consider the expert opinion of Dr. Pritchard as required by s. 490.012(4)(f); (c) predetermining the outcome of the application without regard to any of the statutorily mandated factors, or the submissions of counsel; and (d) misapplying the appellant's criminal history to the analysis under s. 490.012(4)(e).

### **Standard of review**

[49] Section 490.014 of the Criminal Code allows for a right of appeal from the refusal or grant of a SOIRA order. This provision limits the grounds of appeal to those that raise questions of law or mixed law and fact. It also delineates the available remedies. While this provision narrows the issues that may be raised on appeal, it is silent about the standard of review that applies.

[50] The Crown submits that the appropriate standard of review is that articulated in *R. v. Redhead*, 2006 ABCA 84, leave to appeal to SCC ref'd, [2006] S.C.C.A. No. 187, where the Court determined that a SOIRA order, like an appeal from a DNA order under s. 487.054, can only be overturned "where there is an error of principle, failure to consider a relevant factor, an over emphasis of appropriate factors, or a clearly unreasonable decision": at para. 13. Other appellate courts, in and around that same time, reached the same conclusion: see *R. v. Turnbull*, 2006 NLCA 66 at para. 21; *R. v. Debidin*, 2008 ONCA 868 at para. 71.

- [51] The appellant does not address the standard of review in her written argument, nor does she directly address the Crown's position. From her submissions at the hearing, however, it appears she favours the application of general principles for appellate review for questions of law and mixed fact and law.
- [52] At the time of the hearing of this appeal, appellate courts had not yet considered the current SOIRA provisions, as revised by Bill S-12, An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act, 1st Sess., 44th Parl., S.C. 2023, c. 28 (assented to October 26, 2023) ("Bill S-12"). As the current appeal provision now mirrors that in place when Redhead was decided, the Crown urges us to see that decision, and those reaching the same conclusion, as instructive.
- [53] Since the hearing of this appeal, the Alberta and Ontario Courts of Appeal have again considered the standard of review in this context, and both have supported the continuing use of the standard set out in Redhead, Turnbull and Debidin: see *R. v. Weng*, 2025 ABCA 157 at para. 7; and *R. v. Eldon*, 2025 ONCA 348 at para. 21. For reasons I will now explain, I would adopt this standard as well.
- [54] The Court in Redhead held that the standard of review that applies to appeals from DNA orders should also apply to SOIRA orders due to the parallels between the nature of the orders:
- [12] A SOIRA order does not constitute a sentence. Like a DNA order, a SOIRA order is a consequence of conviction, and thus the standard of review for sentencing does not apply. However, the standard of review applied to DNA orders is informative given the parallels between DNA orders and SOIRA orders: both are consequences of a conviction; both exist to assist the police in investigating future crimes; and both infringe upon the privacy and liberty rights of the offender.
- [13] This Court can alter a DNA order decision only where there is an error of principle, failure to consider a relevant factor, an over emphasis of appropriate factors, or a clearly unreasonable decision: *R. v. Christie* (2004), 357 A.R. 4, 2004 ABCA 287 at para. 16; *R. v. Hendry* (2001), 2001 CanLII 21168 (ON CA), 161 C.C.C. (3d) 275 at 284 (Ont. CA). That same standard is applicable to SOIRA orders.
- [55] While three appellate courts have now adopted this approach, I recognize that the Court of Appeal for Saskatchewan, in *R. v. T.C.*, 2009 SKCA 124, in obiter, questioned the holding in Redhead on the basis that the right of appeal from SOIRA orders differs from that of DNA orders:
- [28] As to the standard of appellate review, I observe that some appellate decisions, for example, *R. v. Redhead*, 2006 ABCA 84, (2006), 206 C.C.C. (3rd) 315 (Alta. C.A.) (leave to appeal to S.C.C. refused, [2006] 2 S.C.R. x), have held that the standard is the same for both SOIRA and DNA decisions. I note, however, that the right of appeal with respect to decisions made in relation to SOIRA orders (s. 490.014) is different than that for matters in relation to DNA orders (s.

487.054). Be that as it may, the impact of this difference need not be explored on this appeal as Crown counsel has not called into question the reasonableness of the decision. He has raised questions of law only, which attract the standard of review of correctness.

- [56] While it is true that the DNA and SOIRA provisions differ in their rights of appeal, it must be remembered that these jurisdictional provisions generally only delineate the nature of the issues that can be raised on appeal; they do not determine the standard of review: *R. v. T.W.W.*, 2024 SCC 19 at para. 19. I agree with the Court in *Redhead* that the strong parallels that exist between DNA and SOIRA orders support a conclusion that they should be subject to the same standard of appellate review. The Court in *Redhead* highlighted some of these similarities: they are both consequences of conviction; their purposes are to assist the police in investigating future crimes; and they both have the effect of infringing upon the privacy and liberty rights of the offender: at para. 12.
- [57] To this list I would add another important parallel -- the essence of the decision-making process. As in the DNA context, the decision to except an offender from SOIRA registration involves a highly fact-sensitive exercise of discretion. The analysis requires a careful balancing of relevant competing interests, informed by the mandatory factors enumerated in s. 490.012(4), as well as any number of other factors that may arise in the specific circumstances of the case. See the discussion in *Debidin* at paras. 47-57. In the absence of an error in principle, failure to consider a relevant factor, an overemphasis of appropriate factors, or a clearly unreasonable decision, such discretionary determinations are entitled to substantial deference on appeal.
- [58] There is prior jurisprudence from this Court that, on its face, suggests a different standard of review: *R. v. D.D.*, 2020 BCCA 169. However, as I read that decision, the Court did not make a definitive statement about the issue, electing instead to treat each of the challenges raised by the appellant as questions of law for purposes of its determination, and proceeding on that basis: *D.D.* at para. 17. In the result, *D.D.* is not inconsistent with the standard of review that I say appropriately governs the case before us. Under this standard, legal errors can also displace the deference shown to a decision excepting someone from a SOIRA order and allow for appellate interference.

Did the judge fail to consider the appellant's circumstances?

- [59] The appellant submits that the judge failed to consider the appellant's circumstances, as required in s. 490.012(4)(d). She identifies circumstances related to her marginalization -- homelessness, substance misuse, lack of employment and difficulty complying with court orders -- as those ignored by the judge in relation to the impact of a SOIRA order upon her. As a failure to consider a factor required by a statutory test, the appellant says this error in principle amounts to an error in law.
- [60] I see no such error here. As the Crown observes, the appellant now appears, in advancing this argument, to rely on the "gross disproportionality" exception when, at the hearing below, she relied solely on the "no connection" exception. In any event, the judge

considered, and rejected, the application of both exceptions. In doing so, I am satisfied the judge took account of all of the appellant's circumstances. That the judge did not explicitly reiterate all of these circumstances in her reasons declining to grant the exception to SOIRA registration, does not require a conclusion that she failed to consider them.

- [61] Respectfully, the appellant's submission here ignores that reasons must be read functionally and contextually: *R. v. G.F.*, 2021 SCC 20 at para. 69. In the context of the record, it is clear the judge was aware of the test she was to apply and the factors she was required to consider. Counsel made extensive submissions on both the applicable test and the various factors, including this one. While the judge did not refer, specifically, to all of the appellant's circumstances in that portion of her reasons addressing the SOIRA Order, it is very clear from her concurrent reasons on sentence that she was aware of those circumstances, including any that could inform the assessment of whether a SOIRA order would be grossly disproportionate, or would have no connection to the purposes of the Act. The judge discussed the appellant's circumstances, in great detail, during her reasons for sentence, including circumstances related to the appellant's marginalization and unique vulnerabilities. I would not accede to this ground of appeal.

Did the judge fail to consider the expert opinion of Dr. Pritchard?

- [62] The appellant submits that the judge erred by failing to consider the expert opinion of psychologist Dr. Pritchard, as required by s. 490.012(4)(e). She says the judge appears to have erroneously relied, instead, on the non-expert information provided by the author of the pre-sentence report.
- [63] I do not agree. The judge was required to consider the opinions of Dr. Pritchard, and explicitly did so. She expressly referred to this expert opinion both in her reasons for sentence (at para. 37) and during her SOIRA analysis (at para. 131), specifically noting on the latter occasion Dr. Pritchard's opinions that: the appellant "currently poses a low risk for sexual violence in the future"; "her motivation for the offending in this case was sexual gratification"; and "given her criminal record, the need to evaluate risk for general criminality is high".
- [64] The judge was bound to consider Dr. Pritchard's opinions, but the weight to be afforded them was a matter of discretion. While she did not expressly articulate her finding in this regard, a contextual reading of the reasons in light of the record makes it clear the judge afforded the expert's opinion on risk little weight in the analysis. Judges routinely assess evidence to make findings related to risk of recidivism. Such risk assessments may be informed by expert evidence, but judges are entitled to consider other information relating to risk as well. In this case, in addition to the expert opinion, the judge also considered information identified by the pre-sentence report author relating to the appellant's inadequate understanding of sexual consent and failure to appreciate the impact of the offence on the victim (Sentencing Reasons, at para. 133). That the judge determined to weigh other information more heavily than the expert evidence in her assessment does not

mean she failed to consider the expert evidence. As this Court stated in Hamer, "it is for the judge to decide the facts, not the experts": at para. 138.

[65] Moreover, as the Crown highlights, a low risk of reoffending does not, alone, require a conclusion that an exception applies. A judge is required to consider all of the circumstances that bear on the analysis, including all of those factors enumerated in s. 490.012(4). In my view, the judge did precisely that. The weight she afforded those factors was a matter of discretion and is entitled to deference.

Did the judge predetermine the matter?

[66] While not raised in her written materials on appeal, the appellant's counsel suggested in oral submissions that the judge erred by predetermining the matter, prior to hearing submissions from counsel. Specifically, I understand the submission to be grounded in the following exchange between the judge and the appellant's counsel at the hearing:

THE COURT: And one of the questions I had, Ms. Barton, is so since you went through SOIRA, what are you seeking? You don't say here.

CNSL T. BARTON: No SOIRA order please --

THE COURT: Oh --

CNSL T. BARTON: -- Your Honour.

THE COURT: -- do you have any case law to support that?

**CNSL T. BARTON: I have the Criminal Code --**

THE COURT: I mean, this is -- I've found Ms. Wiens guilty of sexually assaulting an incapacitated, comatose woman and you don't want SOIRA to apply?

CNSL T. BARTON: Yes, Your Honour. I'm suggesting that there is no connection between Ms. Wiens and the need to investigate and prevent sexually violent offences. I'd suggest Ms. Wiens does not have a violent history or a sexually violent history and the purposes of SOIRA is to investigate and manage sex offenders in the community and Ms. Wiens, I'm suggesting, is not one that we need to worry about in the future.

[Emphasis added.]

[67] I do not agree with the appellant's position here. This exchange does not reflect any impropriety on the part of the judge, or that she pre-judged the matter. Judges are entitled to ask questions of counsel -- including questions that may indicate their preliminary view of an issue. Doing so does not mean that the judge has decided the matter in advance, failed to consider the submissions of counsel, or failed to consider the statutory test and/or factors applicable to the test.

[68] The question posed by the judge must be viewed in the context of the record, and on the facts of this case. The SOIRA order in this case was presumptive, unless the appellant could establish an exception should apply. In such circumstances, asking counsel to explain why the presumption should be displaced does not reflect any error -- rather, it reflects a proper understanding of where the burden lies on such an application. Prior to and following this exchange, the parties made thorough submissions on the matter. The record, and the reasons, show the judge reached her conclusion by considering the required test and applicable factors, in light of those submissions. I would not accede to this argument.

Did the judge err in her consideration of the appellant's criminal history?

[69] The appellant submits that the judge erred in her approach to the appellant's lengthy criminal history. Specifically, she contends that because her criminal history does not include any prior convictions for sexual offences, the judge should have viewed it, at most, as a neutral factor in the assessment, rather than one favouring a SOIRA order.

[70] I do not agree. Section 490.012(4)(e) requires a judge to consider "the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence". This language is broad and includes reference to "any offence". Parliament has chosen not to restrict this consideration to a person's history of committing sexual crimes.

[71] The weight to be afforded a history of non-sexual offending is a matter of discretion. In this case, the judge specifically noted the absence of any sexual or violent offending in the appellant's criminal history: Sentencing Reasons at para. 132. She did not equate general criminality with sexual or violent offending. As the Crown submits, given the destabilizing aspects of the appellant's circumstances (including substance misuse) which featured in the offence, the appellant's amenability (or lack thereof) to pursuing a pro-social, law abiding, condition-compliant lifestyle was relevant to risk in this case. The judge made no error in the way in which she approached this factor. Her conclusion was reasonably open to her and entitled to deference.

[72] The SOIRA Order in this case was presumptive. The appellant bore the onus of establishing there was no connection between the order and the specified purposes, or that it would be grossly disproportionate. The judge, applying the correct test and informed by the required factors, determined the appellant failed to meet her burden. In my respectful view, the errors alleged by the appellant amount to nothing more than a disagreement with the judge's exercise of discretion and afford no basis for appellate intervention in this case.

## Disposition

[73] For the reasons provided, I would grant leave to appeal the sentence, but would dismiss the appeal from sentence. I would also dismiss the appeal from the SOIRA Order.

"The Honourable Justice Donegan"

I AGREE:

"The Honourable Mr. Justice Grauer "

I AGREE:

"The Honourable Justice Edelman"

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