

R v Friesen and sentencing for sexual offences against children

In the recent judgment of *R v Friesen*, 2020 SCC 9, a unanimous Supreme Court of Canada had a lot to say about criminal sentencing for sexual offences against children. This info sheet highlights the most salient and impactful points of the judgment's attempt to "bring sentencing law into line with society's contemporary understanding of the nature and gravity of sexual violence against children and [. . .] ensure that past biases and myths do not filter into the sentencing process."

The SCC specifically relates the principles below to the offences of invitation to sexual touching, sexual exploitation, incest, sexual assault, and child luring, as well as child abduction and human trafficking offences "where the victim is a child and the factual foundation for the conviction involves sexual violence or exploitation."

Click on any point below to link to the beginning of the SCC's discussion on that point. This unaltered info sheet may be reproduced and posted freely for non-commercial purposes.

Setting the proper range for sexual offences against children

The SCC is "very concerned by the prevalence of sexual violence against children." The number of police-reported offences has increased, and "it is clear that such reports understate the occurrence of these offences."

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Social media and the internet have exposed children to luring and accelerated the proliferation of child pornography. Technology may also change the nature of sexual offences; eg, where images of the offence are shared online.

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Parliament's increase of an offence's maximum sentence should shift the distribution of proportionate sentences for an offence. Courts should generally impose higher sentences than those imposed before the increase.

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Sentencing courts should depart upward from sentencing precedents that pre-date society's current understanding of the harms and wrongfulness of sexual offences against children, and can even depart upward from recent sentencing precedents that rely on older cases.

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Provincial Courts of Appeal should not create sentencing "caps" that can only be exceeded in "exceptional circumstances" for these offences.

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Mid-single digit penitentiary terms for sexual offences against children are normal, and upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances.

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Substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim.

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Maximum sentences should be imposed whenever the circumstances warrant it, not only for the "worst offence."

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Some provinces (the SCC identified Alberta and British Columbia as examples) have similar sentencing ranges for sexual offences against children and against adults. These jurisdictions must increase their ranges for sexual offences against children to reflect Parliament's direction that offences against children must be punished more severely.

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Sentencing ranges for sexual interference should not be lower than those for sexual assault against a child. The offences are equally serious.

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Prescriptions for a proper sentence

Sentences must fully reflect the life-altering consequences that can and often do flow from the sexual violence.

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Courts cannot simply state that sexual offences against children are serious. The sentence must reflect the character of the offender's actions and the harm to children and their families, caregivers, and communities.

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A sentencing judge must weigh both the *harms* caused by sexual violence against children and its *wrongfulness*. These factors are relevant to both *proportionality* and the *gravity* of the offence.

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Sexual offences against children are always inherently violent and wrongful, and always put children at risk of serious harm, even if the degree of wrongfulness, the extent to which potential harm materializes, and the actual harm vary from case to case.

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Even a single instance of sexual violence has the potential to permanently alter the course of a child's life.

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Harms can manifest in the future. Even if an offender commits a crime that results in no actual harm, courts must consider the potential for reasonably foreseeable harm when imposing sentence.

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Adult-youth sexual relationships are inherently exploitative.

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The child's participation, "de facto consent," or pursuing of the sexual contact does not remove the inherent violence of the offence and is not mitigating. Adults, not children, are responsible for preventing the sexual activity. Sentencing courts should not use the term "de facto consent."

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Victim impact statements will usually provide the best evidence of the actual harm the victim has suffered. However, direct evidence from children or their caregivers is not required for the court to find that children have suffered actual harm.

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Child luring should never be viewed as a victimless crime. The moral blameworthiness of the offence is not lessened where the "victim" of the offence is an undercover police officer.

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Significant sentencing factors

The offender's risk to reoffend is relevant both to protecting children and to the prospects for rehabilitation.

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All other things being equal, an offender who abuses a position of trust, such as a family member, should receive a lengthier sentence than an offender who is a stranger to the child.

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"Grooming" a child can create a trust relationship between the offender and the child, but is aggravating even where no trust relationship exists.

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Sexual violence against children committed on multiple occasions and for longer periods should attract significantly higher sentences.

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The young age of the victim is a significant aggravating factor, but proportionate sentences must still be imposed for offences against adolescent victims.

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The degree of physical interference can be aggravating.

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The SCC offered the following guidance on assessing the effects of *physical interference*:

- The existence of penetration or other sexual acts is not intrinsically significant. The courts should not create differing ranges based on the occurrence or non-occurrence of penetration.
- Courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim. There is no hierarchy of physical acts.
- Courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced.
- The words "fondling" and "caressing" should not be used as they mischaracterize violent conduct.

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