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Citation: *R. v. R.T.A.*, 2015 YKTC 24

Date: 20150709  
Docket: 14-00510  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Judge Cozens

REGINA

v.

R.T.A.

**Restriction on publication: Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 or 486.5 of the *Criminal Code*. Check with the court registry for details.**

Appearances:  
Joanna Phillips  
Gordon Coffin

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR SENTENCING**

[1] R. A. Jr. ("R.A.") has entered a guilty plea to having committed the offence of sexual interference, contrary to s. 151 of the *Criminal Code*. The Crown has elected to proceed by Indictment.

[2] The victim was R.A.'s five year old daughter, E.A.

[3] At the time of the commission of this offence, R.A. and E.A.'s mother were separated. R.A. was living in the basement bedroom of his mother's residence. He had care of E.A. during the week and she resided with her mother on weekends.

[4] While E.A. was in R.A.'s care, there were a number of incidents of sexual interference that occurred in the basement bedroom between June 2013 and January 2014. These included R.A. placing his hand on E.A.'s vagina and licking her clitoris, rubbing her vagina and her bum, rubbing his penis on her vagina and on her hand, and masturbating himself to ejaculation while touching her vagina.

[5] E.A. said she would tell him to stop but he wouldn't. She said he taught her the word "hump".

[6] These incidents became known firstly through a disclosure E.A. made to the school librarian. It was only after this disclosure was made that the incidents stopped.

[7] While initially providing two statements to the RCMP in which R.A. denied any incidents of sexual interference, R.A. provided a further statement in which he admitted responsibility for these acts. In this statement he stated that he believed there were approximately 10 occurrences.

### **Positions of Counsel**

[8] Crown counsel submits that the appropriate disposition is a period of 12 – 18 months custody, to be followed by two years of probation, noting that there is a mandatory minimum sentence of one year custody.

[9] Counsel notes the following aggravating features of this offence:

- R.A. abused a child with whom he was in a position of trust;
- The offence occurred in what was E.A.'s own bedroom where she should feel safe;

- There were a number of incidents;
- The sexual touching progressed to just short of intercourse;
- The incidents occurred while R.A. was sober; and
- The incidents only stopped when E.A. disclosed them to a third party.

[10] In mitigation counsel notes as follows:

- R.A.'s youth and lack of a criminal record
- R.A.'s relatively early guilty plea and acceptance of responsibility which spared the Crown from prosecuting what would have been a difficult case requiring E.A. to give evidence; and
- The **Gladue** factors set out in s. 718.2(e).

#### *Defence*

[11] Counsel for R.A. submits, in light of the above noted aggravating and mitigating factors, that an appropriate disposition is that of one year custody. Counsel takes no issue with a period of probation to follow.

#### **Victim Impact**

[12] Victim Impact Statements ("VIS") were provided by E.A.'s mother, both for herself and for E.A. An additional VIS was provided by E.A.'s godmother.

[13] It is clear that this offence has had a significant impact on E.A., her mother and E.A.'s extended family. There has been considerable pain. The information provided indicates that E.A. has been experiencing nightmares, bedwetting and sleeplessness. She has a fear of being alone. She has expressed anger at her father as well as sadness and hurt.

[14] These impacts are, of course, entirely understandable. Certainly, the betrayal of trust committed by R.A., the number of incidents and the intrusiveness of these incidents, can be expected to have had a traumatic impact upon E.A. and her mother.

[15] I note the following comment from the VIS prepared on behalf of E.A. “This incident has greatly affected [E.A.] and she will be dealing with the trauma for the rest of her life”.

[16] It is my hope, however, that these incidents do not become the focal point around which E.A.’s life is structured in the future. The damage that has been caused, hopefully, is something that she will be able to move beyond if she is allowed and encouraged to do so. In such a way, her victimization will not define her and she should be able to live a healthy life, both physically and emotionally. I would expect that the counselling services she receives would lead her in that direction and I would hope that the support from her family would also work towards attaining the goal of a healthy and productive life.

### **Circumstances of R.A.**

[17] R.A. is a 26 year-old member of the Tetlit Gwich’in First Nation.

[18] A recurring theme in R.A.’s life since childhood is his claim that he regularly experiences visions and “déjà vu”.

[19] The author of the Pre-Sentence Report (“PSR”) writes as follows:

[R.A.] stated that he can have as many as 10,000 to 2,000,000, déjà vu’s or visions in a day, with a vision lasting anywhere from seconds to

hours long. He explained that his experiences have progressed from subjective feelings of a daydreaming/reality as a 3 or 4 year old child to visions involving “bad things” [For example, car accidents] which cause him intense fear and anxiety. He said that he sometimes experiences complex visions that he is not able to comprehend.

[R.A.] disclosed that he is more mentally aware as a result of his visions but that they can be overwhelming and have an impact on his mental and physical wellbeing. He said that he will avoid situations as a result of his experiences; for example, getting in to a vehicle or in another, pursuing a relationship with a woman that he was interested in. He elaborated that his visions sometimes come with multiple futures and that he is never sure which one will occur further informing that there is “nothing new to him” as he has “seen it all before”.

(I note that there are only 86,400 seconds in a 24 hour day. I surmise that the reference to 10,000 to 2,000,000 déjà vu’s or visions in a day is somewhat inflated).

[20] R.A. further stated that he was scared a lot as a result of his visions and/or déjà vu. He says he learned to cope by creating a mental block by reading or playing video games. This allowed him to become stronger and more stable, thus better able to manage them.

[21] Both R.A.’s parents and maternal grandmothers attended residential school. His mother states that, as a result, she had no one to teach her how to be a parent. She has been employed for the past ten years. R.A. states that he is proud of his mother because of her pursuit of her education while raising her children. He describes her as “...a very caring and selfless person who is always ‘thinking about other people’”.

[22] R.A.’s father had a drinking problem when he was younger but has maintained sobriety since 1992. He [R.A.’s father] broke down and cried when speaking to the

author of the PSR about his residential school experiences and the abuse he suffered there.

[23] R.A.'s father was convicted in 2010 of having sexually assaulted one of his daughters in or about 2000-2001. (*R. v. R.A.*, 2010 YKTC 101). The sexual assault consisted of multiple occasions over the course of a week where the father would come into her bedroom at night when she was asleep and touch her in the vaginal area with his fingers. Additionally, there were several occasions in the daytime where he would lay on the couch beside her, put his hand down her pants and squeeze her bum area, saying "This is my bum" to which she would reply "No, it is not". The father was sentenced, on essentially a joint submission after entering a guilty plea on the day of trial, to a nine month sentence to be served conditionally in the community, to be followed by a period of probation of three years.

[24] R.A.'s brother was sentenced, after entering a guilty plea, to 16 months to be served conditionally in the community for sexually assaulting their two sisters between 2005 and 2009 (*R. v. C.D.S.* 2010 YKTC 84). The sexual assault against one sister involved repeated acts of sexual intercourse over a period of years.

[25] R.A. states that when he was about 10 years old he was sexually abused by a female babysitter. They undressed each other and lay together touching each other's private parts. It appears that his brother may have also been the victim of a sexual assault by a babysitter.

[26] R.A.'s family home was marked by substance abuse and domestic violence. R.A. states that his father would yell at him and beat him with several objects or hit him

in the back of the head with an open hand. He described his life at home as "...like walking on 'eggshells' waiting for the next explosion".

[27] The family moved numerous times when the children were growing up. Both parents expressed that "...the frequency of their moves between homes and schools had a damaging impact on their children".

[28] R.A. stated that all the moves caused him to feel shy and often overwhelmed in his new environment.

[29] He had adjustment difficulties in school and recalls being held back in grade two when he was switched from being left-hand dominant to right-hand dominant. He found this to be embarrassing. Overall he describes his educational experience as being "okay". He does state that he was constantly bullied in school and that the teachers did nothing about it when he complained. He said that he aligned himself with other children who were being bullied and they ganged up on the bullies to beat them up.

[30] He stated that he once stabbed someone who was saying disrespectful things about his mother.

[31] It appears from the PSR that R.A. completed Grade 12 but was older than usual at the time he did so.

[32] R.A.'s mother describes him as being an "introverted and anti-social individual who is quiet and keeps to himself". She said that he never really had any friends and no-one came to his 10<sup>th</sup> birthday party.

[33] R.A. describes himself as being a “nice guy” as he has been told “several million times”. He also spoke of himself as having a rich social life “...involving numerous friends and acquaintances with whom he would socialize”. This latter view of his social life is somewhat at odds with his mother’s observations and, in fact, some of R.A’s own observations about the friends he has.

[34] It appears that R.A. attempted suicide in March 2014, as a result of which he was hospitalized for his personal safety. The author of the PSR writes that “[R.A.] described himself as being depressed since early childhood with reoccurring episodes of suicidal ideation”.

[35] R.A. has not worked in the last year. Prior to that he states that he worked at Superstore for a couple of years. He stated that he “...got his job because of his assertiveness, he told them they were going to hire him, and they were going to love him”. He stated that he began to experience panic attacks while working as a cashier and despite his requests to his employer to be moved away from working with people this was not done. Prior to that he worked at Kentucky Fried Chicken where he states that “...he could run the entire restaurant by himself on occasion when other staff would not show up”. He left there because of what he describes as a conflict with his boss.

[36] R.A.’s mother states that the panic attacks R.A. describes and his suicidal behaviour manifested after E.A. made the disclosures and she was removed from his care. She describes him as being “...really frustrated, angry, and agitated” during this time.



[37] He describes his approximately four-year relationship with E.A.'s mother as one of conflict and difficulty. His only other relationship involved a long-distance relationship with another woman who ended up marrying someone else. He states that he was drunk for about a month when he learned she was involved with someone else. He stated that he also wished to pursue a relationship with another woman but decided not to do so after he had a vision 15 years into the future involving a car accident in which only he survived and the rest of his future family died. He states that he " 'cannot pursue happiness' because all he sees is 'sadness' ".

[38] It appears that alcohol and substance abuse are not issues for R.A.

*Attitude towards the incidents of sexual touching*

[39] R.A. told the author of the PSR that the sexual touching was his fault, that he is ashamed of his behaviour and that he wants to be a better father to E.A. This follows his comments that E.A. was encouraging him to touch her and he was responding to her requests. He went so far as to state to the author that E.A. told him that his touching her "...felt 'nice'...that it 'tickled'" explaining that he thought to himself "I am making 'my daughter happy' ".

[40] R.A. advised the author of the PSR that he is willing to take whatever programming is necessary, including sex offender programming. The author states that, given R.A.'s forthrightness regarding his actions and his acceptance of responsibility for them, he would likely benefit from such programming as well as from sex offender treatment.

*Risk Assessment*

[41] R.A. was assessed using the Yukon Supervision Inventory. He was rated as having high criminogenic needs and requiring a medium level of supervision and intervention.

[42] R.A. was also assessed utilizing the STATIC-99R which is an actuarial measure of relative risk for sexual offence recidivism. His risk-rating in relation to other offenders place him in the moderate-low risk category for being charged or convicted of another sexual offence.

[43] R.A. was further assessed using the STABLE-2007. This is an assessment designed to assess changes in intermediate-term risk status, assessment needs and to help predict recidivism in sexual offenders. Of the 13 dynamic risk factors listed, R.A. showed a clinically significant need in two areas: Capacity for Relationship Stability and General Social Rejection/Loneliness. He had clinical concern scores in the areas of: Significant Social Influences; Emotional Identification with Children; Impulsive Acts; Poor Problem Solving Skills; Negative Emotion/Hostility and Sex Drive/Preoccupation.

[44] With respect to the area of Emotional Identification With Children, the author of the PSR notes that R.A. "...communicates an identification with children through imagination and play. However, his behaviour and lack of adult friendships may be indicative of a developmental delay, or earlier experiences with socialization, due to issues of neglect and abuse while growing up or, of some other etiological concern rather than an association with sexual offending behaviours".

[45] With respect to the area of Negative Emotion/Hostility, it is noted that "...perhaps positively, he accepts responsibility for his sexual offending behaviour against his daughter and he communicates a repulsion for his behaviour towards her and he is accepting of the need to deal with his issues".

[46] With respect to Sex Drive/Preoccupation, R.A. recalls an incident when he was between five to seven years of age and he saw the neighbours' kids running naked on the lawn. He described having a sense of excitement and said that he responded inappropriately (although how was not mentioned). He also enjoyed watching the Playboy Channel at a friend's house when he was seven and or eight and began watching pornography at about the age of 12/13.

[47] The STABLE-2007 revealed no clinical concerns in the areas of Hostility towards Women; Lack of Concern for Others; Sex as Coping; Deviant Sexual Preferences and Cooperation with Supervision. His assessment score falls into the range of indicating a moderate level of stable dynamic needs.

[48] When combining the STATIC-99R and the STABLE-2007, the composite assessment places R.A. in the moderate-low category for supervision and intervention in relation to other sexual offenders.

### **Case Law**

[49] In *R. v. H.(P.B.)*, 2012 YKSC 34 the 43-year-old offender entered guilty pleas after two days of trial to having committed two offences contrary to s. 151. The victims

were six and nine-year-old sisters that were the offender's step-daughters in what was an approximately six year common-law relationship.

[50] The victims had been required to testify at trial prior to the pleas being entered.

[51] The offences involved the offender trying, unsuccessfully, to undress the nine-year-old and then placing her hand on his penis. On another occasion he came into the two sisters' bed and grabbed the six-year-olds' hand and had her "hold his penis up and down".

[52] The non-Aboriginal offender had a difficult childhood but was currently noted to be a model employee in his position as a heavy duty mechanic. The impact upon the victims was significant.

[53] Crown counsel, stressing denunciation and deterrence, and noting the aggravating factors, in particular the breach of trust involved, sought a jail term of six months of custody on each charge, to be served concurrently.

[54] Counsel for the offender sought the minimum sentence of 45 days.

[55] The Court imposed a period of six months in custody, with a period of three years' probation to follow.

[56] In *R. v. C.(W.L.)*, 1998 Carswell Yukon 21 (S.C.) the Court imposed a sentence of one year to be followed by one year of probation on a guilty plea to a s. 151 offence. The 34 year-old offender, (at the time of the offence), after a night of drinking, woke up his 10 year old daughter, undressed down to his underwear and climbed into her bed.

He felt his daughter's breasts, vagina and buttocks. He pulled her underwear off, removed her nightgown, took off his own underwear and tried to have sexual intercourse with her. His daughter resisted and threatened to tell her grandmother. Her father told her that if she told they would take her away and he again tried to force intercourse with her. It appears that he was unsuccessful and he went back to his own bed. He apologized to his daughter the next day.

[57] The offender was noted to have a tendency to minimize his behaviour, and to evade responsibility for the offence by blaming alcohol, as well as to minimize the effect his actions had upon his daughter. He was considered to likely be a risk to re-offend if consuming alcohol in similar circumstances.

[58] The Court noted the aggravating features of the breach of trust, repeated attempts at sexual intercourse and threats. The sentencing judge also noted that the complainant was forced to testify at a preliminary inquiry.

[59] In *R. v. C. (J.W.)*, [1996] Y.J. No. 50 (T.C.) the offender entered a plea of guilty to having indecently assaulted his daughter contrary to s. 149 of the *Code*. The offence occurred between 1970 and 1981. He repeatedly molested her beginning when she was six years old and continuing until she was 14. He fondled her in her vaginal area and on one occasion performed cunnilingus on her. She would stick knives into her bedroom door jamb to prevent her father from entering. The molestation only stopped when she threatened to run away from home if he didn't stop.

[60] The offender had no prior criminal history and had entered an early guilty plea. He had a good reputation in the community and considerable community support. The

sentencing judge noted the “exceptionally favourable reports the Court has heard as to the present character and circumstances of the accused”.

[61] However, the offender was noted to minimize the offences and to wonder why his daughter was so upset at him.

[62] Stressing the need for denunciation and deterrence and the aggravating factor of the significant breach of trust, the offender was sentenced to nine months’ custody to be followed by a year of probation.

### **Application to R.A.**

[63] The mandatory minimum sentence for this offence has been increased to one year. Certainly that reflects an intention by Parliament to treat such offences more seriously than in the past. To some extent it can be said that the range of sentences for the commission of this offence prior to the mandatory minimum being increased may be less applicable and of less assistance in determining a fit and appropriate sentence for offences that have occurred subsequent to the change in the legislation.

[64] Nevertheless, a fit and appropriate sentence must still be imposed by balancing all the purposes, objectives and principles of sentencing and applying them to the circumstances of the offence and the offender.

[65] It is certainly aggravating that this offence involved repeated incidents by a father against his young daughter in the room she slept in. The intrusiveness of these incidents was significant, although less significant than incidents that involve attempted intercourse, a circumstance not present in this case, although certainly close to it.

[66] In mitigation, R.A. is remorseful and entered a relatively early guilty plea. This would have been a somewhat difficult case to prosecute and E.A. was not required to testify as a result of the early guilty plea. This is a significant mitigating factor.

[67] R.A. is a young Aboriginal offender and *Gladue* factors are applicable. He had a troubled and difficult childhood in a dysfunctional home, with much of this dysfunction likely closely related to the negative impacts of the residential school system on his parents. He has no prior criminal history. I accept that he is motivated to take assessment, counselling and treatment to address his underlying issues.

[68] His risk rating for re-offending is moderate to low. This said, the PSR raises issues about his thought processes and ideation that causes me some concern in this regard. I believe that there is much unknown about R.A. that will require further insight from counselling and treatment professionals before it is clear what his risk factors actually are.

[69] I am aware that the circumstances of this offence and this offender are different from those in the cases filed and to which I have referred. This is to be expected. I agree that denunciation and deterrence, both specific and general, are the primary objectives of sentencing in this case. Sentences should reflect and express society's abhorrence of such crimes against young children, in particular when the offender occupies the position of trust of a parent.

[70] Considering the similarities and differences between these cases and the case before me, and being cognizant of the change in the sentencing regime to increase the minimum sentence to that of one year imprisonment, thus further differentiating this

case from those filed and referred to, and further considering the aggravating and mitigating features and the sentencing requirements of s. 718 – 718.2, I find that a sentence of one year imprisonment is appropriate for this young Aboriginal first-offender.

[71] I do not believe that a longer sentence is required to express society's denunciation of R.A.'s actions and to deter R.A. or others from the commission of similar offences. Nor is a longer sentence required to give the proper consideration to the other purposes, objectives and principles of sentencing. If I do not consider a longer sentence to be required then, in accordance with the principle of restraint, I should not impose one.

[72] This will be followed by a period of probation of the maximum of three years.

[73] The terms of the probation order will be as follows:

1. Keep the peace and be of good behaviour.
2. Appear before the court when required to do so by the court.
3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly of any change in employment or occupation.
4. Have no contact directly or indirectly or communication in any way with E.A. or K.O, except with the prior written permission of your Probation Officer and with the consent of K.O. in consultation with Victim Services and Family and Children Services.



5. Do not go to any known place of residence, employment or education of E.A. or K.O. except with the prior written permission of your Probation Officer and with the consent of K.O in consultation with Victim Services.
6. Report to a Probation Officer immediately upon your release from custody and thereafter, when and in the manner directed by the Probation Officer.
7. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer.
8. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer and complete them to the satisfaction of your Probation Officer for the following issues:  
psychological issues, sexual offending behaviour, and any other issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this order.
9. Participate in such educational or life skills programming as directed by your Probation Officer and provide your Probation Officer with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this order.
10. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts.

11. Not attend any public park, school ground, daycare centre, public swimming pool, playground, skating rink, community centre, or recreational centre where persons under the age of 16 years are present or might reasonably be expected to be present except in the actual presence of a responsible adult approved in advance by your Probation Office, or as otherwise permitted by your Probation Officer.
12. Have no contact directly or indirectly, nor be alone in the presence of, any person you know to be, or who reasonably appears to be under the age of 16 years except in the actual presence of a responsible adult approved in advance by your Probation Officer, or as otherwise permitted by your Probation Officer.

[74] What I am doing, rather than making a s. 161 order, is incorporating the terms of a s. 161 order into the Probation Order; I would not have made a s. 161 order to be any longer than the Probation Order.

13. You are not to seek, obtain, or continue any employment, whether or not the employment is remunerated, or become or be a volunteer in any capacity that involves being in a position of trust or authority towards persons under the age of 16 years, except with the prior written permission of your Probation Officer.
14. You are not to have any contact – including communicating by any means – with a person who is under the age of 16 years, unless you do so under

the supervision of a person whom the court considers appropriate or with prior written permission of your Probation Officer.

[75] I have also incorporated these terms into the Probation Order, in the event that any assessments are received with respect to sexual offending, behaviour and risk, that indicate that R.A. does not pose such a risk in this matter, so that these terms can be lightened or removed as necessary.

[76] This is a primary designated offence so there will be an Order that you will provide a sample of your DNA.

[77] There will be a SOIRA Order for 20 years.

[78] There will be a mandatory s. 109 Firearms Prohibition.

[79] There is the matter of the Victim Fine Surcharge. I believe it is not mandatory given that the offence took place in June 2013 and the amendments came into place in October. There will be no Victim Fine Surcharge in this case

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COZENS T.C.J.