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IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

TRISTAN BROWN

Publication of information that could identify the complainant is prohibited pursuant to s. 486.4 of the *Criminal Code*

Appearances:
Amy Porteous — Counsel for the Crown
Mark Chandler — Counsel for the Defence

RULING ON *CHARTER* APPLICATION AND REASONS FOR SENTENCE

[1] RUDDY T.C.J. (Oral): Tristan Brown has entered guilty pleas to one count of sexual interference contrary to s. 151(a) of the *Criminal Code*, and one count of uttering a threat to cause death contrary to s. 264.1 of the *Criminal Code*. Mr. Brown's former girlfriend, K.F., is the victim of both offences.

Facts

[2] The relevant facts are set out in an Agreed Statement of Facts filed as exhibit 1 in these proceedings. In summary, Mr. Brown and K.F. began a relationship in March

2017, when Mr. Brown was 20 years old and K.F. was 14 years old. Three months into the relationship, when Mr. Brown was 21 years of age and K.F. was 15 years of age, Mr. Brown penetrated K.F.'s vagina with his penis for the first time. K.F. did not want to have intercourse. She felt pressured by Mr. Brown who undressed her and told her that it was part of being in a relationship and growing up.

[3] On the first occasion, K.F. allowed the penetration because she was scared. When she told Mr. Brown that it hurt and asked him to stop, he told her the pain was part of the first time and to give it a few more minutes, but he continued the penetration.

[4] Over the remainder of the relationship, Mr. Brown penetrated K.F. vaginally with his penis approximately five times per week. He was, at times, pushy, and K.F. would try to avoid him as a result. Mr. Brown would respond by accusing K.F. of having sex with his friends or otherwise try to make her feel badly for not having intercourse with him.

[5] The relationship ended in April 2018. After the break-up, Mr. Brown followed K.F. around, including video recording her, attending at her high school and her place of employment. He would stare at her or call her a slut.

[6] On May 16, 2018, Mr. Brown went to K.F.'s school and they spoke in his car. Mr. Brown yelled and screamed at her, telling her he was going to go to her house and kill everyone inside. K.F. went to the police.

[7] Mr. Brown was arrested the same day and released on conditions including that he report to a bail supervisor and have no contact with K.F. Following his release,

Mr. Brown failed to report to a bail supervisor as required and a warrant for his arrest was issued on June 15, 2018. On both May 24 and June 11, 2018, Mr. Brown approached K.F. and swore at her. Mr. Brown was arrested on June 27, 2018, and released on new conditions, again including no-contact provisions.

[8] Mr. Brown pleaded guilty and opted into the Domestic Violence Treatment Option (DVTO) court, with the consent of the Crown, on January 14, 2019.

[9] In addition to the facts set out in the Agreed Statement of Facts, the following facts have been admitted as aggravating:

- Between May 2018 and late February 2020, Mr. Brown contacted K.F. on several social media platforms without permission;
- The two met at his request on a number of occasions, including a trip to buy her a cell phone in late 2019;
- Mr. Brown explained the DVTO process to K.F., and told her that his case manager thought he was doing well, but that the case manager was not aware that Mr. Brown and K.F. were still spending time together;
- There was no overtly sexual or physical contact between Mr. Brown and K.F. during these occasions;
- In July or early August 2019, K.F. blocked Mr. Brown from contacting her;

- On August 14, 2019, Mr. Brown wrote to K.F., expressing anger over being blocked, and said that it showed she did not actually care about him, or want to fix things. He accused her of choosing other people over him, and told her that he just wanted things to work so they could be happy without arguing and fighting;

- On February 20, 2020, Mr. Brown saw K.F.'s profile on a website, and he wrote to ask her if she was looking for a sugar daddy. He sent her a photo of a large amount of cash and asked her where he should go on vacation. She suggested Australia. Mr. Brown said, "I honestly would have thought about taking you, but every time I try to help, I ended up fucked over, cause you get mad and that's the reason you took it all to court. If you were magically able to stop all of it, I would take you."

Issues

[10] Crown and defence have advanced very different positions in relation to the appropriate sentence in this case. Crown seeks a custodial sentence of 20 months for the s. 151(a) offence and 60 to 90 days consecutive for the s. 264.1 offence for a global sentence of 22 to 23 months' imprisonment. Defence counsel argues that a global sentence comprised of a 12-month conditional sentence order followed by a 12-month probation order is appropriate.

[11] An offence contrary to s. 151(a) is indictable by law, with a maximum sentence of 14 years and a mandatory minimum sentence of one year. As both offences were

charged on the same information, Crown has elected to proceed by indictment with respect to the offence contrary to s. 264.1.

[12] Section 742.1(b) precludes the imposition of a conditional sentence for offences punishable by a minimum term of punishment. Section 742.1(c), precludes the imposition of a conditional sentence for indictable offences with a maximum term of imprisonment of 14 years or life. In the circumstances, the sentence sought by defence is statute barred.

[13] As a result, defence has filed a Notice of Application setting out a two-pronged constitutional challenge alleging, firstly, that the one-year mandatory minimum sentence for an offence contrary to s. 151(a) violates s. 12 of the *Charter*, and secondly, that the limitation on the availability of conditional sentence orders under s. 742.1(c) violates s. 7 of the *Charter*.

[14] Accordingly, the issues to be determined are as follows:

1. Does the one-year mandatory minimum punishment in s. 151(a) constitute cruel and unusual punishment contrary to s. 12 of the *Charter*?

2. Does the restriction on the availability of a conditional sentence set out in s. 742.1(c) violate the s. 7 *Charter* right to life, liberty, and security of the person? and

3. Subject to the ruling on issues 1 and 2, what is the appropriate sentence in light of the circumstances of the offences, the offender, and the victim in this case?

Issue 1: Sections 12 and 151(a)

[15] With respect to the s. 12 challenge, defence counsel acknowledges that the mandatory minimum punishment of one year under s. 151(a) would not be grossly disproportionate in its application to Mr. Brown and the circumstances of this case. Rather, he argues that it violates s. 12 in its reasonably foreseeable application to other offenders.

[16] The Crown takes the position that the mandatory minimum in s. 151(a) would not result in grossly disproportionate penalties either for Mr. Brown or for any offender in reasonably foreseeable hypotheticals, particularly in light of the Supreme Court of Canada's comments in the recent decision of *R. v. Friesen*, 2020 SCC 9, regarding the moral blameworthiness and potential for harm inherent in sexual offences against children. Accordingly, Crown submits the mandatory minimum at issue does not constitute cruel and unusual punishment under s. 12.

[17] Crown does concede, however, that if the Court finds the mandatory minimum to be in violation of s. 12 of the *Charter*, it would not be saved by s. 1.

Section 12 Analytical Framework

[18] Section 12 of the *Charter* provides that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment". In the Supreme Court of

Canada decision in *R. v. Lloyd*, 2016 SCC 13, McLachlin C.J. affirmed the analytical framework to be applied with respect to s. 12 at paras. 22 – 24 as follows:

> 22 The analytical framework to determine whether a sentence constitutes a "cruel and unusual" punishment under s. 12 of the *Charter* was recently clarified by this Court in *Nur*. A sentence will infringe s. 12 if it is "grossly disproportionate" to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: *Nur,* at para. 39; *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. A law will violate s. 12 if it imposes a grossly disproportionate sentence on the individual before the court, or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others: *Nur*, at para. 77.
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> 23 A challenge to a mandatory minimum sentencing provision under s. 12 of the *Charter* involves two steps: *Nur*, at para. 46. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code* . The court need not fix the sentence or sentencing range at a specific point, particularly for a reasonable hypothetical case framed at a high level of generality. But the court should consider, even implicitly, the rough scale of the appropriate sentence. Second, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances: *Smith*, at p. 1073; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 498; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at paras. 26-29; *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 337-38. In the past, this Court has referred to [page 149] proportionality as the relationship between the sentence to be imposed and the sentence that is fit and proportionate: see e.g. *Nur*, at para. 46; *Smith*, at pp. 1072-73. The question, put simply, is this: In view of the fit and proportionate sentence, is the mandatory minimum sentence grossly disproportionate to the offence and its circumstances? If so, the provision violates s. 12.
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> 24 This Court has established a high bar for finding that a sentence represents a cruel and unusual punishment. To be "grossly disproportionate" a sentence must be more than merely excessive. It must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society: *Smith*, at p. 1072, citing *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 688; *Morrisey*, at para. 26; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14. The wider the range of conduct and circumstances captured by the mandatory minimum, the more likely it is that the mandatory minimum will apply to offenders for whom the sentence would be grossly disproportionate.

[19] Accordingly, the analytical framework to be applied requires that consideration first be given to the appropriate sentence to be imposed, and whether the mandatory minimum at issue would then constitute a grossly disproportionate sentence in the case at bar. If not, step two requires consideration of whether the mandatory minimum may result in a grossly disproportionate penalty in relation to other hypothetical offenders in circumstances that may reasonably be expected to arise (*R. v. Nur,* 2015 SCC 15, at para. 77).

[20] It must be remembered that, as a judge of a statutory court, I do not have the power to strike down legislation I find to be unconstitutional pursuant to s. 52 of the *Constitution Act*, *1982*. Rather, should I find a provision to be unconstitutional, I am empowered to find that the provision is invalid and of no effect only with respect to the particular case before me in which the argument has been made (see *R. v. Lloyd*, 2014 BCCA 224). The law would otherwise continue to be in full force and effect. Consequently, any findings with respect to constitutionality of the two impugned provisions would have impact only on Mr. Brown.

Appropriate Sentence

[21] Turning to the first step, while defence counsel has conceded that the minimum sentence in s. 151(a) would not be grossly disproportionate in relation to Mr. Brown in the circumstances, the analytical framework nonetheless requires an assessment of the appropriate sentence in this case as the first step.

[22] Determination of a fit sentence takes place within a well-defined legal framework requiring consideration and balancing of often diametrically opposed objectives and interests.

[23] Sentences are crafted with a view to achieving certain objectives, including, on the one hand, important punitive objectives of deterrence, denunciation, and separation of offenders from society intended to signal society's abhorrence for particular offences and to protect victims and the public as and when required. On the other hand, consideration must be given to more restorative objectives of rehabilitation, reparations, and promoting a sense of responsibility in offenders with a view to reducing recidivism and promoting acknowledgement and atonement for harm caused.

[24] The fundamental principle of sentencing is the imposition of a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1). With respect to the gravity of the offence, the general rule is the more serious the crime and its consequences, the greater the need to prioritize the punitive objectives and the heavier the sentence (see *R. v. Lacasse*, 2015 SCC 64).

Gravity of Offence

[25] Pursuant to s. 718.01, primary consideration must be given to denunciation and deterrence where the offence involves the abuse of a person under the age of 18 years. Section 718.2(a)(ii) provides that commission of an offence against an intimate partner is statutorily aggravating, although I am mindful of the fact that the intimacy of the relationship makes out the offence itself in the case at bar. Section 718.2(a)(ii.1) mandates that the abuse of a person under the age of 18 be considered an aggravating

factor in sentencing. Similarly, under s. 718.2(a)(iii.1), the impact of the offence on the victim is also a statutorily aggravating factor.

[26] In this case, the victim, K.F. was 15 years of age at the time the offences were committed against her. She has provided a Victim Impact Statement, detailing the impact the offences have had on her.

[27] In *Friesen*, the Supreme Court of Canada addressed the application of s. 718.01 in determining appropriate sentences for sexual offences against children as follows:

> 104 Section 718.01 thus qualifies this Court's previous direction that it is for the sentencing judge to determine which sentencing objective or objectives are to be prioritized. Where Parliament has indicated which sentencing objectives are to receive priority in certain cases, the sentencing judge's discretion is thereby limited, such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority (*Rayo*, at paras. 103 and 107-8) …
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> 105 Parliament's choice to prioritize denunciation and deterrence for sexual offences against children is a reasoned response to the wrongfulness of these offences and the serious harm they cause. The sentencing objective of denunciation embodies the communicative and educative role of law (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 102). It reflects the fact that Canadian criminal law is a "system of values". A sentence that expresses denunciation thus condemns the offender "for encroaching on our society's basic code of values"; it "instills the basic set of communal values shared by all Canadians" (*M. (C.A.)*, at para. 81). The protection of children is one of the most basic values of Canadian society (*L. (J.-J.)*, at p. 250; *Rayo*, at para. 104). As L'Heureux-Dubé J. reasoned in *L.F.W.*, "sexual assault of a child is a crime that is abhorrent to Canadian society and society's condemnation of those who commit such offences must be communicated in the clearest of terms" (para. 31, quoting *L.F.W. (C.A.)*, at para. 117, per Cameron J.A.).

[28] The Court stresses the need for increased sentences to reflect the gravity of sexual offences against children and the harm caused to young victims. Courts are directed to consider not just actual harm, apparent at the time of sentencing, but also

potential future harm to child victims of sexual offences, noting the frequency of adverse affects developing in adulthood, including difficulty forming relationships, struggles with substance abuse, mental health issues, and self-harming behaviours to name but a few. At para. 84, the Supreme Court noted:

> As a result, courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence. Even if an offender commits a crime that fortunately results in no actual harm, courts must consider the potential for reasonably foreseeable harm when imposing sentence (A. Manson, *The Law of Sentencing* (2001), at p. 90). When they analyze the gravity of the offence, sentencing judges thus must always take into account forms of potential harm that have yet to materialize at the time of sentencing but that are a reasonably foreseeable consequence of the offence and may in fact materialize later in childhood or in adulthood. To do otherwise would falsely imply that a child simply outgrows the harm of sexual violence (see Wright, at p. 88).

[29] Some of these negative impacts are already apparent in the Victim Impact Statement provided by K.F. She has struggled with fear, anxiety, and depression. Mr. Brown's persistence in breaching the no-contact order has led her to avoid school attendance and quit her employment. Her existing relationships with family, friends, and colleagues have been negatively affected, and she has developed trust issues in forming new relationships.

[30] Of particular note, K.F.'s Victim Impact Statement references having been manipulated to believe that what was happening was okay. This manipulation is evident in the Agreed Statement of Facts admitted to by Mr. Brown in telling K.F. that having sex is "part of being in a relationship and growing up"; in ignoring her request to stop because it was painful and telling her that pain is "part of the first time"; in being "pushy

with her in his advances for vaginal intercourse"; in accusing her of having sex with his friends or otherwise "try to make her feel bad for not having intercourse with him".

[31] While no sentence imposed can put K.F. in the position she would have been in had these offences not been committed against her, it can be said, in no uncertain terms, that what happened to her was wrong. What happened to her was a crime.

[32] It must be remembered that, subject to close in age exceptions, persons under the age of 16 cannot consent to sexual activity with adults, the very reason for this restriction is that the relative developmental level of a child or young person puts them at risk of sexual victimization using this very type of manipulation.

[33] In *Friesen*, the Supreme Court of Canada makes it clear that apparent acquiescence is not to be considered a mitigating factor in sentencing sexual offenders, noting at para. 152:

> 152 Second, a victim's participation should not distract the court from the harm that the victim suffers as a result of sexual violence. We would thus strongly warn against characterizing sexual offences against children that involve a participating victim as free of physical or psychological violence, as some courts appear to have done (see *Caron Barrette*, at para. 46). Instead, as the majority held in *Hajar*, "Violence is inherent in [such offences] since [they] involv[e] an adult's serious violation of a child's sexual integrity, human dignity and privacy *even in cases of ostensible consent*" (para. 115 (emphasis in original)). The fact that additional forms of violence such as weapons, intimidation, and additional physical assault may not be present does not provide a basis to ignore the inherent violence of sexual offences against children (see Marshall, at p. 220).
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> 153 Third, in some cases, a victim's participation is the result of a campaign of grooming by the offender or of a breach of an existing relationship of trust. In no case should the victim's participation be considered a mitigating factor. Where a breach of trust or grooming led to the participation, that should properly be seen as an aggravating factor (*R. v. P.M.* (2002), 155 O.A.C. 242, at para. 19; *R. v. F. (G.C.)* (2004), 71

> O.R. (3d) 771 (C.A.), at paras. 7 and 21; *Woodward*, at para. 43). Adolescence can be a confusing and challenging time for young people as they grow and mature, navigate friendships and peer groups, and discover their sexuality. As Feldman J.A. wrote in *P.M.*, to exploit young teenagers during this period by leading them to believe that they are in a love relationship with an adult "reveals a level of amorality that is of great concern" (para. 19).
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> 154 Finally, a victim's participation should never distract the court from the fact that adults always have a responsibility to refrain from engaging in sexual violence towards children. Adults, not children, are responsible for preventing sexual activity between children and adults (*George*, at para. 2; *R. v. Audet*, [1996] 2 S.C.R. 171, at para. 23). …

[34] Lastly, in considering the gravity of the offence contrary to s. 151(a), it is important to remember that while Mr. Brown has pleaded guilty to a single count of sexual interference, the charge covers a multiplicity of incidents over an extended period. Per *Friesen*, the duration and frequency of the sexual violence must be given weight in sentencing. The charge must not be sentenced as if it involved a single incident of sexual violence (see *Friesen* at paras. 131-133).

Degree of responsibility

[35] While s. 718.01 mandates denunciation and deterrence as the primary sentencing objectives in sexual offences against children given the gravity of the offence, this does not eliminate the need to consider other sentencing objectives and principles. As noted in *Friesen*:

> 104 **…** However, while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and *Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality (see *R. v. Bergeron*, 2013 QCCA 7, at para. 37 (CanLII)).

[36] Thus, in addition to considering the gravity of the offence, imposition of a proportionate sentence requires consideration of the degree of responsibility of the offender, which, in turn, requires consideration of the circumstances of the offender, and the applicability of the more restorative objectives of sentencing, including rehabilitation, and the principle of restraint under s. 718.2(e), which requires the 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".

[37] In terms of Mr. Brown's circumstances, he is now 24 years of age and is a non-status member of the Nacho Nyak Dun First Nation. There was no criminal record filed, although defence counsel and the DVTO Treatment Summary indicate that Mr. Brown did have a prior assault charge for which he was conditionally discharged in 2017.

[38] Mr. Brown has a supportive family, most notably his mother with whom he resides. She indicates that she has observed a lot of personal growth in her son through the course of his time in DVTO, particularly over the past year.

[39] With respect to his time in DVTO, the Treatment Summary outlines Mr. Brown's rehabilitative efforts and performance. Mr. Brown spent approximately 20 months in DVTO. In addition to being closely supervised by two separate case managers at the Justice Wellness Centre, Mr. Brown completed the following programming during his time in DVTO:

- All four sessions of the Foundations program offered through Mental Wellness and Substance Abuse Services (MWSUS) in February and March, 2019;

- The Respectful Relationships program through the Justice Wellness Centre in March and April, 2019;

- The Living Without Violence Program in June and July, 2019;

- One-to-one counselling sessions with Psychologist Svenja Weber; and

- Two risk assessments completed by Craig Dempsey with the Forensic Complex Care Team (FCCT) at MWSUS.

[40] Mr. Brown's performance in programming and under supervision is best described as uneven, resulting in mixed levels of success. Ultimately, Mr. Brown did not successfully complete the DVTO program, but is entitled to credit for the rehabilitative efforts he did make in DVTO. Also, to his credit, he continued one-to-one counselling of his own accord following his time in DVTO. His ongoing efforts in this regard must also be considered.

[41] Other mitigating factors include Mr. Brown's positive antecedents, his supportive family, and his Aboriginal heritage. While the information before me does not indicate significant *Gladue* factors specific to Mr. Brown, judges in the Yukon are well acquainted with the history of systemic racism and the overrepresentation of Indigenous offenders in our justice system and jails. Sentencing a young, Indigenous adult with no prior record to a jail sentence is not something that should ever be taken lightly.

Sentence Range

[42] Counsel have provided a number of cases to support their respective positions as to the appropriate sentence.

[43] Defence has provided three cases in which a suspended sentence was imposed. Each, in my view, are distinguishable.

[44] *R. v. Semchuk*, 2011 BCSC 1553, involved a historical offence in which a teacher briefly rubbed the breasts of a nine-year-old student over clothing at a track meet. Crown and defence counsel both sought a suspended sentence, but differed on the appropriate length of the probation order. Notwithstanding the clear breach of trust, the case bears little factual similarity to Mr. Brown's offence.

[45] In *R. v. G.J.J.*, 2006 BCPC 170, also an historical offence, the 19 or 20-year-old offender invited the 14-year-old victim to touch his penis and perform oral sex on him. The offender was noted to have intellectual deficits at the time of the commission of the offence, and had since suffered brain damage resulting from two head injuries. Again, the case is factually distinguishable.

[46] The case of *R. v. J.G.*, 2017 ONCJ 881, is closer in terms of facts. The 19-year-old offender and the 14-year-old victim were both students attending the same high school when they began a relationship. A report was made to the police by the victim's parents upon learning of the sexual nature of the relationship. The Court suspended the passing of sentence and placed J.G. on probation for 12 months.

[47] Unlike Mr. Brown, the judge noted "there was no suggestion of undue influence, persuasion or manipulation on the part of JG to have KV engage in sexual activity". Furthermore, it is important to note that *J.G.* predates the Supreme Court of Canada decision in *Friesen*. Given the Court's strong condemnation of treating victim acquiescence or apparent consent as a mitigating factor where a victim is too young to consent, it is difficult to imagine how a suspended sentence would be considered a fit sentence post-*Friesen*.

[48] Indeed, even before *Friesen*, the Yukon Court of Appeal in *R. v. Rosenthal*, 2015 YKCA 1, overturned a suspended sentence imposed for a single count of digital penetration on a sleeping victim and imposed a 14-month jail term, on the basis that, notwithstanding the lack of a prior criminal record, a suspended sentence did not meet the principles of denunciation and deterrence.

[49] The final case provided by defence is the British Columbia Court of Appeal decision in *R. v. Scofield*, 2019 BCCA 3, an appeal of a six-month conditional sentence order. In terms of facts, the 22-year-old offender engaged in sexual activity, including unprotected vaginal intercourse on four to five occasions with one victim, and on two occasions with the other. Both victims were 15 years old. The Court of Appeal held the trial judge's consideration of "the lack of violence, threats and manipulation, and *de facto* consent" as mitigating factors, rather than as the absence of aggravating factors, amounted to an error in law. The Court of Appeal, however, determined that the treatment of the offender's significant cognitive and intellectual deficits as mitigating appropriately supported the imposition of a conditional sentence on the basis of

diminished moral culpability; however, the Court increased the conditional sentence order to 12 months.

[50] It is notable that the Court of Appeal, in *Scofield*, held "that multiple acts of sexual intercourse between a person in their early twenties and victims approaching 16 years old will normally attract a prison sentence of more than one year". Indeed, Harris J. indicated that absent the exceptional circumstances of the offender's intellectual and cognitive deficits, a 15-month term would have been necessary to meet the principles of denunciation and deterrence; however, the Supreme Court of Canada in *Friesen*, criticized the *Scofield* decision at para. 115, specifically for applying the same sentencing range for "sexual assault involving intercourse" to offences against both children and adults rather than imposing more severe punishments for offences involving child victims.

[51] Crown points to the long-established sentencing range of 12 to 30 months for sexual assault on a sleeping or unconscious adult victim established in the Yukon Supreme Court decision of *R. v. White*, 2008 YKSC 34, affirmed by the Yukon Court of Appeal in *Rosenthal*, and argues that application of the *Friesen* decision would suggest that a higher range must be applied for sexual offences against child victims.

[52] Crown has also provided the Yukon Supreme Court decision of *R. v. Mathieson*, 2018 YKSC 49, which is perhaps most factually similar to the case at bar. The 27-year-old offender had sexual intercourse on two occasions, and engaged in oral sex, with the 14-year-old victim who described the offender as her boyfriend. The offender entered a guilty plea to an offence contrary to s. 271. His repeated failure to comply

with the reporting condition of his release was read in as an aggravating factor. The trial judge imposed the mandatory minimum sentence of six months' imprisonment followed by 15 months' probation.

[53] The appeal decision includes an extensive review of cases with similar fact patterns and age differences between offender and victim concluding that they denote a range of 12 to 18 months. Acknowledging the primacy of denunciation and deterrence for offences involving the abuse of a person under the age of 18 along with other aggravating factors, Campbell J. substituted a sentence of 9 months' imprisonment plus 15 months' probation, noting at para. 101:

> … Mr. Mathieson's difficult circumstances and background as an Aboriginal person, his relatively young age, his early guilty plea, his insight and remorse, his sustained efforts prior to sentencing at dealing with his substance abuse and mental health issues and his path toward rehabilitation must also be recognized and should result in a sentence lower than that of 12 to 18 months' imprisonment.

[54] Crown argues that the *Friesen* decision necessitates a finding that the range established in *Mathieson* should be increased in recognition of the seriousness of sexual offences against children.

[55] Having reviewed the relevant case law, I am satisfied that the *Scofield* and *Mathieson* decisions most closely resemble the circumstances of offence and offender before me. The *Mathieson* decision would place Mr. Brown in the pre-existing range of 12 to 18 months' imprisonment.

[56] However, I am further satisfied that the appropriate range, following the direction in *Friesen*, should now be higher than the previously accepted range. Given the

duration and frequency of Mr. Brown's offending against K.F., which far exceeds the number of instances in either *Mathieson* or *Scofield*, and the direction of the Supreme Court of Canada in *Friesen*, I am satisfied that a sentence in the range of 18 months to two-years would be appropriate with respect to Mr. Brown. Given his guilty plea, his young age, his lack of a criminal record, and his Aboriginal heritage, I would place him towards the lower end of that range. In addition, Mr. Brown is entitled to a reduction in sentence with respect to his efforts toward rehabilitation both in and after his time in DVTO.

[57] DVTO is one of two therapeutic courts in the Yukon that offers offenders who are motivated to address the underlying criminogenic factors giving rise to their offending behaviour the opportunity to pursue treatment intended to assist in reducing the risk of recidivism. Demonstrated rehabilitation is factored into the determination of an appropriate sentence. Participants who successfully complete the program, in general, receive a community-based disposition. Participants who do not fully complete the program are given credit, generally in the form of a reduction in sentence for partial completion based on partial performance.

[58] A number of factors make it particularly difficult to calculate appropriate credit for Mr. Brown's efforts in DVTO. Admission into DVTO on a sexual offence is highly unusual, particularly for an offence this serious. As a result, there are no real DVTO comparators to assist in determining credit. Furthermore, it is unclear what expectations Mr. Brown was given upon entry to the DVTO program in terms of anticipated credit for successful completion to provide me with a high watermark against

which to assess his partial completion. A final complicating factor is the inconsistency of Mr. Brown's performance both under supervision and in programming while in DVTO.

[59] Regarding compliance with supervision, Mr. Brown's reporting was noted to be inconsistent. Mr. Brown initially did well with completing tasks and maintaining a cycle of reporting as required. He then failed to attend appointments for several weeks. With prompting, he would return to regular reporting for several months before the cycle would begin again.

[60] By May 2019, Mr. Brown's female case manager noted that Mr. Brown was engaging in concerning behaviours including significant amounts of victim blaming and general hostility toward women. Following a case conference, Mr. Brown was given the opportunity to continue in the DVTO program. Mr. Brown was transferred to a new case manager, and did well for two months with both reporting and program attendance. In late July 2019, Mr. Brown began expressing frustration. His behaviour again indicated a hostility toward women and a reluctance to take full responsibility for his offences. Thereafter, his overall performance and attitude improved and no further concerns were noted until March 2020.

[61] On March 3, 2020, it was brought to the case manager's attention that Mr. Brown was not complying with the no-contact condition of his release, and, indeed, it was learned that Mr. Brown, as he has now admitted in these proceedings, was consistently in breach of the no-contact condition throughout the time of his supervision in the DVTO program.

[62] Similarly mixed results are noted with respect to Mr. Brown's participation in programming. A report of his attendance in the Respectful Relationships Program indicates that he attended all sessions, accepted some responsibility for his behaviour, and appeared to understand the concepts presented; however, Mr. Brown blamed his victim for some of his behaviour and presented as a less active participant in the program offering little self-disclosure and needing prompting before contributing to group discussions.

[63] In the Living Without Violence program, Mr. Brown was a more active participant and appeared to learn and internalize the skills presented; however, he continued to give mixed messages about the extent of his acceptance of responsibility for his actions.

[64] With respect to one-to-one counselling, Mr. Brown engaged with Ms. Weber on his own initiative in February 2020. He attended six sessions up to April 30, 2020. Mr. Brown then missed five consecutive appointments, causing Ms. Weber to advise that she would be closing his file. Mr. Brown then re-engaged with Ms. Weber. He has continued his counselling sessions with Ms. Weber over the past year with an apparent improvement in his level of engagement and motivation. This would coincide with the improvement noted by his mother in his overall level of maturity. As of February 2021, Mr. Brown had attended a total of 34 counselling sessions with Ms. Weber.

[65] In her first report, included at tab 21 of the Accused's Book of Authorities, Ms. Weber describes Mr. Brown as "motivated and engaged in his treatment" with "good

insight into his cognitions as well as behaviours". In her written update dated February 25, 2021, filed as exhibit 3, Ms. Weber indicates the following:

> Tristan presents as a client who is self-aware, open to explore and process his experiences, and able to receive feedback. He already posited many pro-social behaviours and coping strategies prior to commencing therapy with me and I believe that these have developed further through our therapeutic work. Tristan has a solid support network and strong family connections which he identifies as protective factors.
>
> I determine Tristan to be mentally balanced, emotionally stable and possessing the life skills that will allow him to continue to be a contributing member of society. In my professional opinion Tristan's goals for treatment have been satisfied.

[66] Ms. Weber goes on to opine that "further legal discipline may have a counterproductive and even detrimental effect on my client's mental health and overall well-being."

[67] As noted, Mr. Brown also participated in a number of risk assessments. Risk of future recidivism is a relevant consideration in crafting a fit sentence, and in assessing credit for rehabilitative efforts. In *Friesen*, the Supreme Court of Canada made the following comments in this regard:

> 123 Where the sentencing judge finds that the offender presents an increased likelihood of reoffending, the imperative of preventing further harm to children calls for emphasis on the sentencing objective of separating the offender from society in s. 718(c) of the *Criminal Code*. Emphasizing this objective will protect children by neutralizing the offender's ability to engage in sexual violence during the period of incarceration (see *K.R.J.*, at para. 52). The higher the offender's risk to reoffend, the more the court needs to emphasize this sentencing objective to protect vulnerable children from wrongful exploitation and harm (*L.M.*, at para. 30; *S. (J.)*, at paras. 39 and 84).
>
> 124 The offender's likelihood to reoffend is clearly also relevant to the objective of rehabilitation in s. 718(d) of the *Criminal Code*. Courts should

> encourage efforts toward rehabilitation because it offers long-term protection (*Gladue*, at para. 56). Rehabilitation may also weigh in favour of a reduced term of incarceration followed by probation since a community environment is often more favourable to rehabilitation than prison (see *Proulx*, at paras. 16 and 22). …

[68] Risk assessments conducted at the Justice Wellness Centre at the beginning of Mr. Brown's time in DVTO include the following:

- The LS/CMI placed Mr. Brown at medium level of risk/needs;
- The SARA-V3 placed Mr. Brown at a moderate level of risk for further violence in a spousal context; and
- The combined STATIC-99R and STABLE-2007 resulted in a composite score placing Mr. Brown at a moderate high overall priority for intervention in relation to sexual offending.

[69] Mr. Brown was referred to FCCT for further risk assessment in relation to sexual offending in November 2019. Mr. Dempsey's assessment placed Mr. Brown at low risk to reoffend sexually; however, at the initial sentencing hearing in December 2020, concerns were raised about whether Mr. Dempsey had complete information in reaching his opinion, noting the assessment did not consider Mr. Brown's ongoing non-compliance and inappropriate behaviour with respect to K.F., which came to light in March 2020. Sentencing was adjourned for a supplemental risk assessment to be conducted, factoring in the additional information.

[70] The updated Risk Assessment Report dated February 23, 2021, was filed as exhibit 2. Mr. Brown was assessed using the Risk for Sexual Violence Protocol (RSVP) placing Mr. Brown at a low/moderate risk to reoffend sexually.

[71] The assessment does note some areas of concern in relation to Mr. Brown's attitude towards the offences. While admitting to a sexual relationship with K.F., he maintains it was entirely consensual. He indicates he was aware of the legal bar to such activity given K.F.'s age, but justifies his actions by suggesting that somehow K.F.'s mother gave him permission to have a sexual relationship with her daughter. This seems entirely unlikely, but, even if such consent had been given, it is troubling that Mr. Brown would believe that someone else could consent to sexual activity on K.F.'s behalf, or that this would absolve him of legal responsibility for his actions.

[72] The assessment further notes that Mr. Brown lacks insight into his abusive behaviour, which includes sexual entitlement, coercion for sexual activity, jealousy, power, and control. In terms of Mr. Brown's future risk, Mr. Dempsey notes "[h]is power and control and jealousy while in **any** intimate relationship may warrant further exploration in the event he experiences this in relationships in the future. This is the most likely scenario that may cause him emotional dysregulation and subsequent abusive behaviour". Mr. Dempsey notes there is no indication of sexual deviancy. This seems to suggest that Mr. Brown is at higher risk for spousal abuse than for future sexual offences against children.

[73] However, Mr. Dempsey indicates that, at the current time, Mr. Brown is maintaining his mental and emotional stability, and is a minimal risk to public safety.

Mr. Dempsey has consulted with Ms. Weber and notes her opinion that Mr. Brown does not require regular therapeutic engagement, but rather can access counselling on an as needed basis.

[74] Like Ms. Weber, Mr. Dempsey raises concerns about further intervention in relation to Mr. Brown, noting:

> Research indicates that individuals who are at lower risk and spend a protracted period of time "justice involved" are more likely to continue to be "Justice involved". As such it may be detrimental to Mr. Brown's well-being and contrary to correctional reform principles to continue to involve him in the Criminal Justice System. …

[75] It must be acknowledged that, while Ms. Weber and Mr. Dempsey have concerns about ongoing justice system involvement for Mr. Brown, his rehabilitation and his best interests are not the sole, nor even the primary concern, in determining a fit sentence.

[76] Furthermore, it is difficult to reconcile some of the information provided by Ms. Weber and Mr. Dempsey with Mr. Brown's performance in DVTO in determining what weight to place on their opinions in assessing appropriate credit. Specifically, based on the information before me, I have difficulty understanding how Mr. Brown can be said to have met treatment goals and be of minimal risk to the public when there appear to be ongoing concerns about the extent to which Mr. Brown accepts responsibility for his behaviour. His limited insight into the abusive nature of his behaviour, both physical and verbal, appears not to have been fully addressed. This may well be a reflection of his relative immaturity, but it would certainly seem that Mr. Brown would benefit from ongoing therapeutic intervention to assist him in identifying abusive behaviours and reducing his risk of employing such behaviours in

the context of a relationship. I am satisfied, however, that his efforts to date have at least laid a therapeutic foundation to build upon. His engagement is to his credit, particularly his pursuit of ongoing counselling with Ms. Weber following his removal from DVTO.

[77] Weighing all of the information before me, I am satisfied that recognition of the time spent under supervision and the efforts made toward rehabilitation, both in DVTO and most particularly after, warrant a reduction of his sentence to one of 12 months' imprisonment with respect to the offence contrary to s. 151(a). With respect to the offence contrary to s. 264.1, in light of Mr. Brown's guilty plea, lack of a prior criminal record, his time in DVTO, and his Aboriginal heritage, I am satisfied that a sentence of one day deemed served is appropriate.

[78] The appropriate sentence, therefore, clearly demonstrates that the mandatory minimum sentence in s. 151(a) does not constitute cruel and unusual punishment, contrary to s. 12 of the *Charter*, in its application to Mr. Brown.

[79] Consideration of whether it would be appropriate to allow Mr. Brown to serve his sentence in the community pursuant to a conditional sentence order will depend entirely on the ruling with respect to the constitutionality of s. 742.1(c).

Reasonable Hypothetical Analysis

[80] Step two of the s. 12 analytical framework requires consideration of whether the mandatory minimum sentence in s. 151(a) would result in grossly disproportionate sentences in its reasonably foreseeable application to other offenders. This analysis is

done on the basis of reasonable hypotheticals. The Supreme Court of Canada in *Nur* made it clear that such hypotheticals need not be situations likely to arise with some frequency; rather, they need only be situations that may reasonably arise, and are not remote or far-fetched (*Nur* at para. 56-57).

[81] Counsel for Mr. Brown, in his written factum, offers two hypotheticals for consideration:

> 21. The facts of the first hypothetical example are as follows:
>
> a. The accused, who is 20 years old, and the complainant, who is 15 years old, are in a boyfriend-girlfriend relationship. There is a five-and-a-half year age gap between them.
>
> b. The accused does not have a criminal record.
>
> c. They have a happy relationship and enjoy spending time together.
>
> d. From time to time, the accused and complainant kiss on the mouth. There is no allegation that any of the contact between them is coercive or exploitative.
>
> e. The complainant's parents find out that their daughter has a 20-year-old boyfriend and contact the police.
>
> f. The complainant is upset by her parents' actions of reporting the accused to the police. She would like to continue her relationship with the accused.
>
> 22. The facts of the second hypothetical example are as follows:
>
> a. The accused, who is 20 years old, and the complainant, who is 15 years old, are in a boyfriend-girlfriend relationship. There is a five-and-a-half year age gap between them.
>
> b. The accused does not have a criminal record.
>
> c. On five separate occasions, the accused and the complainant had consensual sex.

d. When the accused and the complainant break up, the complainant reports the accused to the police.

e. The accused is Aboriginal and has a history of intergenerational trauma from the residential school history in his family and community.

f. The accused expresses extreme remorse for his conduct, and completes the Domestic Violence Treatment Options Court programming and counselling with unequivocal success.

g. The accused has been clinically assessed as a low risk to re-offend.

[82] Crown argues that the first scenario lacks the requisite *mens rea* for sexual interference as not all kisses are sexual in nature. The Crown further argues that in the second hypothetical, while *Gladue* factors and completion of a therapeutic court program may militate in favour of a lesser sentence, they would not render the mandatory one-year minimum sentence grossly disproportionate.

[83] In my view, Crown is correct in her assessment of the second hypothetical, particularly in light of *Friesen* and the case law regarding the sentencing range for like offences already discussed in this decision. With respect to the first hypothetical, however, it would take only minor changes to make out the requisite *mens rea*, such as the kissing being accompanied by words expressing a sexual interest. In such circumstances, a sentence of one year in prison would clearly be grossly disproportionate.

[84] While it may be argued that such a fact pattern would normally attract a summary proceeding under s. 151(b), in *Nur*, the Supreme Court of Canada made it clear that the ability of the Crown to elect to proceed summarily in less serious circumstances cannot

be said to prevent an indictable mandatory minimum from being grossly disproportionate in its reasonably foreseeable effect. In the words of McLachlin C.J. at para. 86 of *Nur*:

> … To accept this argument would result in replacing a public hearing on the constitutionality of s. 95 before an independent and impartial court with the discretionary decision of a Crown prosecutor, who is in an adversarial role to the accused.
>
> Sentencing is inherently a judicial function. It is the courts that are directed by Parliament to impose a mandatory minimum term of imprisonment, and it is the duty of the courts to scrutinize the constitutionality of the provision. The Crown's submission is in effect an invitation to delegate the courts' constitutional obligation to the prosecutors employed by the state, leaving the threat of a grossly disproportionate sentence hanging over an accused's head.

[85] The constitutionality of the one-year mandatory minimum in s. 151(a) has been frequently litigated and there are numerous appellate authorities that have already found it to be unconstitutional under s. 12 of the *Charter*. These decisions were recently summarized by the Ontario Court of Appeal in *R. v. B.J.T*., 2019 ONCA 694:

> 71 However, the issue of the constitutionality of the mandatory minimum for sexual interference (s. 151(a) of the *Criminal Code*) has recently been considered by five other courts of appeal across the country:**1** the Quebec Court of Appeal in *Caron Barrette c. R.,* 2018 QCCA 516, 46 C.R. (7th) 400; the Nova Scotia Court of Appeal in *R. v. Hood,* 2018 NSCA 18, 409 C.R.R. (2d) 70; the Manitoba Court of Appeal in *R. v. JED*; the British Columbia Court of Appeal in *R. v. Scofield,* 2019 BCCA 3, 52 C.R. (7th) 379; and since the argument of this appeal, the Alberta Court of Appeal in *R. v. Ford,* 2019 ABCA 87, 371 C.C.C. (3d) 250. In all five cases, the courts found the mandatory minimum in s. 151 of the *Criminal Code* contravened s. 12 of the *Charter* and was not saved by s. 1.
>
> 72 In those cases, the courts noted that the offence of sexual interference can be committed in a variety of ways, thereby increasing the potential for the mandatory minimum sentence to be found to be grossly disproportionate in some circumstances for some offenders. In four cases, hypothetical circumstances for conviction were posited and accepted as

reasonably foreseeable, while in *JED*, the Manitoba Court of Appeal accepted the reasonable hypotheticals posited by the two other courts (Q.C.C.A. and N.S.C.A.) whose decisions pre-dated *JED*, as appropriate for the analysis. Steel J.A. noted that they were based on previous cases before the court. All five appeal courts found the mandatory minimum sentence to be grossly disproportionate to a range for an appropriate sentence for the reasonably foreseeable hypothetical offender in the posited circumstances.

73 In *Scofield,* the B.C.C.A. postulated a hypothetical where two young people meet at a party; one is almost 16, while the other recently turned 21, making the close in age exception (s. 150.1(2.1) of the *Criminal Code*) inapplicable. The two people drink alcohol and smoke marijuana, reducing their inhibitions. They go to a private bedroom where they engage in some kissing and brief sexual touching over their clothing for ten minutes. They act willingly and know each other's ages. Neither has a criminal record. Harris J.A. concluded that a one-year sentence for that conduct would be grossly disproportionate to a proportionate sentence which would not necessarily involve imprisonment or even a conditional sentence. He also added that if the 21 year-old had a disability that reduced his moral culpability or if *Gladue* factors applied, (*R. v. Gladue*, [1999] 1 S.C.R. 688,) those two characteristics of the offender could make the mandatory minimum sentence more disproportionate.

74 In *Caron Barrette*, the facts were that the offender was 23 years old. He engaged in a romantic relationship with a 14 year-old girl with her parents' consent. Neither was aware that their conduct was illegal. The court found that a 90 day intermittent sentence was proportionate and that the one-year mandatory minimum was therefore grossly disproportionate. The court also confirmed that the three reasonable hypotheticals postulated by the trial judge were appropriate and supported the finding that the mandatory minimum of one year contravened s. 12 of the *Charter*. Those three were:

> 1.A romantic relationship similar to that which existed between the offender and the victim, but for a period of several days, which only involved kissing and touching;
>
> 2.An isolated caress, over the clothes, on the thigh or buttocks, not in the context of an abuse of authority, where the sexual touching is found to be without consequences for the victim; and
>
> 3.A romantic relationship in which the victim is 15 1/2 years old and legally unable to consent at the beginning of the relationship, and the relationship continues after she reaches 16 years old.

> 75 I agree that the hypotheticals postulated in these cases are reasonable and that the one-year mandatory minimum sentence would be grossly disproportionate to a proportionate sentence for the offender in those circumstances. As a result, the mandatory minimum sentence constitutes cruel and unusual punishment contrary to s. 12 of the *Charter*. The Crown does not submit that such a provision is saved by s. 1.

[86] In my view, these appellate decisions are largely dispositive on the question of the constitutionality of the one-year mandatory minimum sentence under s. 151(a).

[87] The sole question remaining is whether, as is implicitly argued in the Crown's written factum, the s. 12 analysis with respect to s. 151(a) and gross disproportionality is impacted by the *Friesen* decision which post-dates the aforementioned appellate decisions striking down the mandatory minimum.

[88] In assessing this argument, it is important to note that while *Friesen* provides clear direction on the need to increase sentences for sexual offences with child victims, it does not address the constitutionality of any of the mandatory minimums in relation to sexual offences against children. Furthermore, while the *Friesen* decision criticized the British Columbia Court of Appeal's use of the same sentencing range for sexual offences against both adult and child victims in the *Scofield* decision, the Supreme Court made no comments in relation to the British Columbia Court of Appeal's ruling in *Scofield* in relation to the constitutionality of the mandatory minimum punishment in s. 151(a). Indeed, at para. 91, the Supreme Court referenced the *Scofield* decision with apparent approval in acknowledging the broad range of conduct encompassed by sexual assault and sexual interference in saying:

> 91 These comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The

> proportionality principle requires that the punishment imposed be "just and appropriate ..., and nothing more" (*M. (C.A.)*, at para. 80 (emphasis deleted); see also *Ipeelee*, at para. 37). First, as sexual assault and sexual interference are broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. Second, the personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability (*R. v. Scofield*, 2019 BCCA 3, 52 C.R. (7th) 379, at para. 64; *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269, at para. 180).

[89] In *Lloyd*, the Supreme Court of Canada referenced the constitutional vulnerability of mandatory minimums for offences covering a broad range of conduct at para. 3:

> As this Court's decision in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, illustrates, the reality is that mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence. …

[90] In my view, nothing in *Friesen* alters the fact that the wide net cast by s. 151(a) will continue to capture reasonably foreseeable situations in which the one-year mandatory minimum punishment will be grossly disproportionate to the conduct in violation of s. 12 of the *Charter*. As quite properly conceded by the Crown, the mandatory minimum is not saved by s. 1. Accordingly, I find the mandatory minimum to be invalid in its application to Mr. Brown.

Issue 2: Sections 7 and 742.1(c)

[91] As noted, counsel for Mr. Brown argues that Mr. Brown should be entitled to serve his sentence in the community pursuant to a conditional sentence order under s. 742.1. A conditional sentence is currently barred in these circumstances by operation

of s. 742.1(c), which mandates that conditional sentences are not available as a sentencing option for any offence, including s. 151(a), prosecuted by indictment with a maximum term of imprisonment of 14 years to life.

[92] As noted, defence has filed a constitutional challenge arguing that s. 742.1(c) violates s. 7 of the *Charter* which reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[93] There is little doubt that the impugned provision engages a liberty interest. At issue is whether the limitation on use of a conditional sentence is in accordance with the principles of fundamental justice.

[94] The Supreme Court of Canada, in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, held that a law that impacts liberty will not be in accordance with the principles of fundamental justice where the impugned provision operates in a way that is arbitrary, overbroad, or grossly disproportionate.

[95] In this case, the applicant argues only that the impugned provision is overbroad.

[96] *Bedford* defined overbreadth, beginning at para. 112:

> 112 Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. …
>
> 113 Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the

> individual and whether the effect on the individual is rationally connected to the law's purpose. …

[97] A determination of whether an impugned provision is overbroad "…turns on the relationship between the law's purpose and its effect…" (see *R. v. Safarzadeh-Markhali*, 2016 SCC 14, at para. 24), hence the starting point for any assessment of overbreadth, begins with a determination of the purpose of the law.

[98] Section 742.1 came into force in 1996. When initially enacted, the section did not include the impugned provision. Imposition of a conditional sentence required only that three preconditions be met: the offence not be subject to a mandatory minimum punishment; the appropriate sentence be less than two years; and service of the sentence in the community would not endanger the community.

[99] The impugned provision was added in 2012 as part of a series of amendments included in the *Safe Streets and Communities Act*, S.C. 2012, c. 1 (the "*Act*").

[100] In *R. v. Neary*, 2017 SKCA 29, the Saskatchewan Court of Appeal, in addressing the same s. 7 challenge, considered the purpose of the *Act* and reached the following conclusion at para. 35:

> On this basis, I conclude that the *Act* reflects at least the following broad purposes:
>
> (a) providing consistency and clarity to the sentencing regime;
>
> (b) promoting of public safety and security;
>
> (c) establishing paramountcy of the secondary principles of denunciation and deterrence in sentencing for the identified offences; and

> (d) treating of non-violent serious offences as serious offences for sentencing purposes.

[101] In *R. v. Sharma*, 2020 ONCA 478, counsel agreed with the purpose of the *Act* as set out in *Neary*; however, the Ontario Court of Appeal, as it was entitled to do, defined the purpose more narrowly as: "…to maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive prison sentences" (see para. 148). This purpose is adopted in the dissent, but framed as "[t]he purpose of the impugned provisions is to ensure that offenders who commit serious crimes receive fit sentences, deemed to include a period of incarceration" (see para. 283).

[102] In my view, the purpose as set out in *Sharma* is too narrow. Excerpts from the *House of Commons Debates* provided in the Crown's Book of Authorities make it clear that the *Act*, while certainly intended to ensure jail sentences for serious crimes, was also intended to prioritize denunciation and deterrence for certain types of offences, notably sexual offences against children, and to bring clarity and consistency to the availability, or rather non-availability of conditional sentences.

[103] In introducing the Bill in the *House of Commons Debates*, 41-1, No 17 (21 September 2011) at 1520 (Hon Rob Nicholson), the Minister of Justice noted:

> The exploitation of children is a most serious crime, one that is incomprehensible and must be met with appropriate punishment. Bill C-10 proposals addressing child sexual exploitation were addressed in the previous bill. These reforms seek <u>to consistently and adequately condemn all forms of child sexual abuse</u> through the imposition of new and higher mandatory sentences of imprisonment, as well as some higher maximum penalties. (emphasis added)

[104] Later, on September 22, 2011, in the *House of Commons Debates*, 41-1, No 18 (22 September 2011) at 1315 (Mrs. Shelly Glover), after noting inconsistencies in the judicial interpretation of "serious personal injury offence", a previous limitation on the availability of conditional sentences, it was noted:

> Greater clarity and consistency is needed to limit the availability of conditional sentences and to protect Canadians from serious and violent offenders. In order to address these concerns, the proposed amendments contained in this bill would retain all the existing prerequisites for conditional sentences but would make it crystal clear which offences are ineligible. …

[105] I am satisfied the purpose of the *Act* is not limited to ensuring jail sentences for serious offences. I would adopt the purpose as defined in *Neary* with some slight variations as follows:

- Ensuring severe sentences, presumptively jail sentences, for serious offences;
- Prioritizing denunciation and deterrence for specific serious offences; and
- Ensuring clarity and consistency in limitations on the imposition of conditional sentences for serious offences.

[106] There have been a number of decisions that have considered whether amendments limiting access to conditional sentences violate s. 7 of the *Charter*. Two appellate decisions are directly on point. Crown asks that I follow the Saskatchewan

Court of Appeal in *Neary*. Defence asks that I follow the Ontario Court of Appeal in *Sharma*.

[107] In *Neary*, the offender was convicted of drug charges relating to 13 pounds of marijuana. The offender had no prior criminal record, was a high school valedictorian, now attending post-secondary education on a football scholarship, maintaining steady employment, and had a supportive family. The offender challenged s. 742.1(c) and (e)(ii), which precluded the imposition of a conditional sentence, arguing that the provisions were overbroad in their application to him on the basis that the legislative objectives of deterring serious crimes and protecting the public from serious offenders were not engaged in light of his positive personal circumstances.

[108] The Court found that the law was not overbroad in its application to the offender, noting, firstly, "[t]he gravity and seriousness of the offences are not attenuated by the personal circumstances of the accused" (see para. 39). The Court went on to find:

> 41 The principles of denunciation and deterrence are paramount in the sentencing of offences such as the ones committed by Mr. Neary. He clearly trafficked drugs for profit. It is otherwise law-abiding citizens like Mr. Neary who must be deterred from engaging in illegal activities which appear to generate quick and easy money.
>
> 42 The legislative objectives of deterring serious crime and, in particular, serious violent and property crime and protecting Canadians from serious offenders are engaged in Mr. Neary's case. The offences he has committed are serious. The Canadian public must be protected from the conduct in which Mr. Neary was engaged. His offences, even though non-violent, must be dealt with as serious offences for sentencing purposes. The removal of a conditional sentence as an alternative to institutional incarceration serves the legislative objectives of the impugned law, i.e., to deter serious crime and, in particular, violent and property crime, and to protect Canadians from serious offenders. Mr. Neary clearly falls within the law's intended scope.

[109] The Court further held that the impugned provisions were not overbroad in their application to the reasonable hypothetical advanced by Mr. Neary in his factum, although not outlined in the decision.

[110] In *Sharma*, the offender was a young single mother of Aboriginal heritage who had smuggled a significant amount of cocaine into Canada, when pressured by her boyfriend, to keep from being evicted from her home. The Court outlined significant *Gladue* factors in the offender's background. The offender challenged s. 742.1(c) under both s. 15 and s. 7 of the *Charter*. A majority of the Ontario Court of Appeal held that the impugned provision violated both s. 15 and s. 7. As the defendant has chosen not to pursue the s. 15 argument, only the Court's ruling on s. 7 is relevant.

[111] The Court found the impugned provision to violate s. 7 on the basis of overbreadth, noting at para. 161:

> … While there will be cases where eliminating the availability of a sentence served in the community and mandating a sentence of imprisonment could meet Parliament's purpose of incarcerating those who commit serious crimes, there will be many other cases where, as in *Safarzadeh-Markhali*, the impugned provisions will impact people they were not intended to capture.

[112] The Court, in reaching this conclusion, was primarily concerned with the use of maximum sentence as the only marker denoting the seriousness of the offences for which a conditional sentence would no longer be available. The Court acknowledges that maximum sentence is one marker of seriousness, as noted by Doherty J.A. in *R. v. Hamilton*, [2004] 72 O.R. (3d) 1 (C.A.), but that the assessment of seriousness requires consideration beyond just the maximum sentence:

> 167 When read in context, Doherty J.A.'s acknowledgement that the maximum penalty for an offence can reflect its seriousness in a generic sense was tempered significantly by his concurrent observation that the actual circumstances in which a specific offender committed a specific offence will play a critical role in the determination of seriousness. This description is consistent with the sentencing framework in the *Criminal Code* and Ms. Sharma's submission that the seriousness of a crime is not determined solely by the maximum penalty, viewed in isolation. Sentencing is not an abstract inquiry and cannot be divorced from the circumstances of the commission of the crime, which will reduce or increase the level of seriousness of the offence in any particular case. …

[113] In determining which line of authority to follow, I would note that Mr. Brown, like Mr. Neary, falls squarely within the intended scope and purpose of the legislation. There is no disputing that sexual interference is, objectively, a serious offence. There is no disputing that the facts of the sexual interference, as committed by Mr. Brown, amount to a serious offence. There is no disputing the need to impose sentences for such offences that denounce the conduct and deter others from committing similar offences, with a view to protecting children. The case before me falls well short of persuading me that the impugned provision is overbroad in its application to Mr. Brown.

[114] With respect to whether the impugned provision is overbroad in its application to others, one can only agree with Feldman J. in *Sharma* that the use of maximum sentence as the sole marker of seriousness will inevitably capture offences for which the circumstances of commission are not particularly serious. This is well summarized by Mascia J. in *R. v. Salem*, 2021 QCCQ 3624:

> 330 Generally speaking, I agree with the Court in *Sharma* that maximum penalties--taken in isolation--cannot be a true measure of the seriousness of a crime. A proportional sentencing framework has to account for the particular circumstances of the offender and the circumstances in which he or she committed the crime.

> 331 While s. 742.1 c) was aimed at sending a message of deterrence to those who commit serious crimes, it also has the unfortunate effect of barring less serious offenders from a conditional sentence. No distinction is made between the kingpin and the junkie who sells drugs to feed his habit. All offenders are lumped together without any consideration for their individual characteristics and whatever role they may have played in the commission of the offence.
>
> 332 Individualized justice, however, is not compatible with a "one-size fits all" approach. The fundamental principle of sentencing in our country is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (*Criminal Code*, s. 718.1). …

[115] I accept that the operation of the impugned provision does disentitle offenders who have committed factually less serious offences from conditional sentences, and it certainly makes it more difficult for judges to impose a proportionate sentence in such cases, but does this impact render the impugned provision unconstitutional? Or as Mascia J. puts it in *Salem*: "Though I might have preferred a different formulation to the legislation restricting conditional sentences for certain offences, can it be said that an offender has a constitutional right to a conditional sentence?" (see para. 336).

[116] In *R. v. Proulx*, 2000 SCC 5, the Supreme Court, in discussing whether conditional sentences are appropriate for certain types of offences, recognized the authority of Parliament to restrict the use of conditional sentences in saying that Parliament "could easily have excluded specific offences in addition to those with a mandatory minimum term of imprisonment but chose not to" (see para. 79).

[117] In *R. v. Lloyd*, at the Supreme Court of Canada said at para. 45:

> 45 Parliament has the power to make policy choices with respect to the imposition of punishment for criminal activities and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society. Courts

owe Parliament deference in a s. 12 analysis. As Borins Dist. Ct. J. stated in an oft-approved passage:

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.

(*R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont.), at p. 238)

[118] Similarly, the Supreme Court of Canada, in *Safarzadeh-Markhali*, said at para. 71:

> 71 To say that proportionality is a fundamental principle of sentencing is not to say that proportionality in the sentencing process is a principle of fundamental justice for the purpose of determining whether a deprivation of liberty violates s. 7 of the *Charter*, notwithstanding the *obiter* comment of LeBel J. in *Ipeelee*. The principles and purposes for determining a fit sentence, enumerated in s. 718 of the *Criminal Code* and provisions that follow -- including the fundamental principle of proportionality in s. 718.1 -- do not have constitutional status. Parliament is entitled to modify and abrogate them as it sees fit, subject only to s. 12 of the *Charter*. Parliament can limit a sentencing judge's ability to impose a fit sentence, but it cannot require a sentencing judge to impose grossly disproportionate punishment. …

[119] In my view, the impugned provision will capture situations that are factually less serious than in Mr. Brown’s case, and the limitation on the use of a conditional sentence in such cases clearly limits a judge’s ability to impose a fit sentence. However, in the absence of a mandatory minimum punishment for which a conditional sentence would

not be available in any event, it is difficult to conclude that the lack of access to one sentencing option, even if it is the preferred option, would thereby require a sentencing judge to impose a grossly disproportionate sentence when the full range of sentencing alternatives, other than a conditional sentence, would remain available to reflect less serious circumstances.

[120] In *R. v. Perry*, 2013 QCCA 212, the Quebec Court of Appeal, in finding that the predecessor exclusion of conditional sentences for “serious personal injury offences” did not violate ss. 7, 9, or 12 of the *Charter*, made the following comments that are apropos:

> 152 The addition of an exclusion for "serious personal injury offences" within the meaning of section 752 *Cr. C.* to section 742.1 *Cr. C*. constitutes merely one more limitation on the judge's sentencing power. One may lament this choice and feel that Parliament is misguided. But that is not sufficient. The choice was a political one, and its appropriateness may not be questioned by judges so long it does not violate the offender's constitutional rights, as is the case here.

[121] In the result, I am not persuaded that the impugned provision violates s. 7 of the *Charter*. Accordingly, by virtue of s. 742.1(c), I am precluded by operation of law from allowing Mr. Brown to serve his sentence in the community pursuant to a conditional sentence order.

[122] In so concluding, I wish to make it clear that I am very cognizant of the difficulty of crafting appropriate sentences for Aboriginal offenders that address s. 718.2(e) in a meaningful way absent the option of a conditional sentence. The applicant, quite fairly, highlighted this difficulty in his written submissions. Unfortunately, even though the applicant relies heavily on *Sharma* in support of his constitutional challenge under s. 7,

the impact of removing conditional sentences as an option for Aboriginal offenders with serious offences is addressed in the *Sharma* decision under the s. 15 challenge. The s. 15 argument was not advanced nor argued before me. Accordingly, I can make no findings in this regard.

Issue 3: The Sentence

[123] Based on my findings with respect to the two constitutional challenges, I impose a sentence of 12 months' imprisonment on the offence contrary to s. 151(a). Given the significant time Mr. Brown has spent under supervision, I would decline to add an additional probationary term. The sentence with respect to the offence contrary to s. 264.1 is one day deemed served.

[124] In addition, I am required to consider the imposition of ancillary orders. Given the nature of the most serious offence, I must, and do, impose the following orders:

- As s. 151(a) is a primary designated offence, there will be an order that Mr. Brown provide such samples of his blood as are necessary for DNA testing and banking;

- There will be an order prohibiting Mr. Brown from having in his possession any firearms, ammunition, or explosive substances for a period of 20 years as required under s. 109; and

- Mr. Brown will be required to comply with the requirements of the *Sex Offender Information Registration Act* for a period of 10 years.

[125] Finally, I am also required to consider the imposition of a victim surcharge. Given Mr. Brown's impending custodial status, the victim surcharge is waived on the basis it would cause undue hardship.

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RUDDY T.C.J.