Citation: *R. v. Charlie*, 2021 YKTC 48 Date: 20211021
Docket: 18-00781
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

DAVID TIMOTHY CHARLIE

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

Appearances:
Kevin Gillespie — Counsel for the Crown
Amy Steele — Counsel for the Defence

REASONS FOR SENTENCE

[1] RUDDY T.C.J. (Oral): David Timothy Charlie was found guilty after trial of sexually assaulting C.J. on April 15, 2018, in Carmacks, Yukon. He is now before me for sentencing.

Facts

[2] The facts of the offence are set out in greater detail in the trial decision released on March 18, 2021. In brief, a number of individuals, including C.J., were socializing and drinking at Mr. Charlie's residence. C.J. was extremely intoxicated and fell asleep

on the bed in the spare room. She was awakened the following day to a sudden stinging pain, almost like a tearing, in her anus. She looked back and saw Mr. Charlie standing behind her with his penis inserted in her anus. She told him to stop, to which he first replied, "Are you serious?", though he did stop and C.J. was able to leave the residence. At the time of the offence, C.J. was 16 years old.

Victim Impact

[3] Crucial to a determination of a fit sentence is the recognition that this process is not only about Mr. Charlie, but also about C.J. and the terrible toll that this offence has had, and will likely continue to have on this young woman. C.J. has provided a Victim Impact Statement that provides some insight into how her life has already been impacted. She speaks of days where she struggles to get out of bed. She is sad all the time. She speaks of days where she struggles with thoughts of suicide, and talks of the pain of feeling isolated within her own community as many of her friends and even family members continue to party with Mr. Charlie and speak of him as a fun guy with no apparent regard for what Mr. Charlie has done to her and how it has affected her, both physically and mentally, in profoundly negative ways. She is left feeling that what was done to her does not matter to anyone around her. She also has times where she questions herself and struggles with feeling as if she is at fault.

[4] Sadly, C.J.'s experience is not at all unusual for victims of sexual assault and, even more sadly, the effects on victims of this type of offence can persist indefinitely. In the face of that kind of pain, the justice system often feels like a blunt instrument. Well-established and important legal principles can make the process seem

unresponsive to a victim's needs. This has been an unduly long and difficult process which has, no doubt, taken its own toll on C.J. as she has waited for this matter to come to a conclusion.

[5] Furthermore, it must be recognized that there is absolutely nothing that I can do today that will fix what has happened to C.J. No matter what sentence I impose, I cannot do the one thing that would make this better, which would be to go back and change it. No sentence I impose can repair the harm done to her, but, at the outset of this decision in which the application of the law is going to require me to talk a lot about Mr. Charlie, I wanted C.J. to know that that does not mean that what was done to her and its impact on her is not also at the forefront of my mind.

[6] That being said, there are some things that I do want C.J. to know. I know she is not here but her dad is on the phone and the Victim Services worker is present as well.

[7] Firstly, I want C.J. to know that this was not her fault. She was not in any way to blame. Everyone, no matter their age or gender, is entitled to expect that they will not be preyed upon when they are at their most vulnerable, and that includes C.J. She is not responsible for the choices Mr. Charlie made to take advantage of her vulnerability.

[8] Next, I want C.J. to remember that she is stronger than she believes. As noted, this is not an easy process for victims, yet she still came forward and told her story to the police. She still came before the Court and testified at the preliminary inquiry. She still came before the Court and testified at trial. She still prepared and filed a Victim Impact Statement. All of that takes incredible courage and fortitude, even more so when an offence like this happens in such a small community. I hope she remembers

how strong she is on her more difficult days, and that she keeps reaching out for help and support. There are people and agencies out there who do care, who do understand, and who will be there to support her as she moves forward.

Sentencing Framework

[9] Turning to consideration of the appropriate sentence, it must be recognized that sentencing within the criminal justice system is done within a complex legal framework that requires the Court to consider and balance multiple, often conflicting, factors. I think it is important to give a brief overview of the framework and some of the factors relevant to this proceeding that I must consider.

[10] Firstly, the objectives of sentencing require consideration of the goals of the sentence to be imposed. Most commonly, sentencing requires a balancing between the punitive objectives of denunciation and deterrence on the one hand, and rehabilitation on the other. It is important to note that because the offence in this case involved the abuse of a person under the age of 18 years, who is considered to be a vulnerable victim by virtue of the fact that she is both Aboriginal and female, ss. 718.01 and 718.04 of the *Criminal Code* require that primary consideration be given to the objectives of denunciation and deterrence.

[11] Next, the *Criminal Code* requires application of several sentencing principles including:

- That the sentence strive for parity with sentences imposed for similar offences committed by similar offenders. This is the principle that

requires me to consider all of the case law that we discussed at length on Monday;

- That the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. This requires me to consider the circumstances of both offence and offender, and the impact on the victim;

- That the sentence not deprive the offender of their liberty if less restrictive sanctions are appropriate; and

- That the Court must consider all available sanctions other than jail, particularly in the case of Indigenous offenders, a principle that is commonly shorthanded to "*Gladue*", after the first case before the Supreme Court of Canada that discussed the issue of the overrepresentation of Indigenous offenders in Canada's justice system and jails at length, and which directed courts to consider how historic and systemic discrimination has resulted in that overrepresentation, and steps that we can, and must, take in an effort to reduce that impact.

[12] Application of these sentencing principles, in turn, requires consideration of what we call "aggravating and mitigating" factors. Aggravating factors are factors which will increase the appropriate sentence, while mitigating factors will serve to decrease the appropriate sentence.

[13] A number of factors present in this case are statutorily aggravating. That means the *Criminal Code* says I must consider them as aggravating, although they are the type of factors we would consider as aggravating in any event. They include, again, that the offence involved the abuse of a person under the age of 18 and also the significant impact that the offence has had on C.J. These aggravating factors are particularly important to this case.

[14] One of the big issues for me to consider is the impact of a recent decision of the Supreme Court of Canada, which has urged us to rethink the way in which we sentence offenders who have committed sexual offences against victims who are under the age of 18. We are still at the very early stages of considering the impact of that decision, and it will likely be some time before its effects have been fully litigated in trial and appellate courts across the country such that we have a sense of the full impact of that decision over the longer-term. But it does mean we are in a somewhat difficult position of trying to decide that impact with very little to rely upon, hence the reason it took us so long to have what no doubt were very obscure legal discussions for the rest of the people sitting in the courtroom on Monday.

[15] Other offence-specific aggravating factors include the fact that Mr. Charlie took advantage of an intoxicated, sleeping, and vulnerable victim, behaviour that is seen as extremely aggravating, given the prevalence of sexual assaults on unconscious or sleeping victims in the Yukon. It has been recognized as such on many occasions by our Court of Appeal.

[16] With respect to mitigation, the primary issue for consideration would be the impact of Mr. Charlie's Indigenous heritage and extremely dysfunctional background on his degree of moral blameworthiness — those would be the *Gladue* factors I was referring to earlier.

[17] Consideration must also be given to any rehabilitative efforts, although steps taken by Mr. Charlie appear to have come about rather late in the day and there is little track record to enable me to assess performance and likelihood of success of his rehabilitative prospects over the longer-term.

[18] I should note the fact that Mr. Charlie opted to plead not guilty and proceed to trial is not considered to be an aggravating factor on sentence. Every Canadian is entitled to stand on their right to a fair trial in which the Crown is required to prove the offence beyond a reasonable doubt, and when we get to the sentencing process, they are not punished for making that decision.

[19] However, while proceeding to trial is not an aggravating factor on sentence, it does mean that Mr. Charlie is not entitled to the mitigating impact of a guilty plea and acceptance of responsibility. Pleas of guilt are extremely mitigating on sentence, particularly in cases like this because a guilty plea means that the victim is not put through the requirement to testify in court, as C.J. was, in this particular case, on two occasions.

Background of Offender

[20] As noted, the determination of a fit sentence does require me to consider Mr. Charlie's background and current circumstances. I should point out that consideration of an offender's background is not about looking to excuse his behaviour; it is rather about understanding where someone comes from and why they have become involved in criminal behaviour to help us craft sentences that are meaningful, and, hopefully, more effective in achieving sentencing objectives and reducing recidivism.

[21] Mr. Charlie comes before the Court with a prior criminal record. The bulk of his convictions are for unrelated offences and occurred between 2000 and 2001. His most recent and only conviction for another violent offence was in 2020 for assault causing bodily harm. The victim of that offence was male and unknown to Mr. Charlie. However, it is unclear whether that offence pre- or post-dates this particular offence, so there are limitations as to the impact that it will ultimately have on the sentence I impose today.

[22] In terms of background, I have had the benefit of both a Pre-Sentence Report (“PSR”) and a *Gladue* Report, which provide me with extensive information about Mr. Charlie and his circumstances, and both of which have been extremely valuable to me in the work that I need to do. I am going to provide a bit of a summary of the background circumstances that I learned through those two reports.

[23] Mr. Charlie is now 41 years of age. He is of both Northern Tutchone and Dene descent, and a member of the Little Salmon Carmacks First Nation through his mother.

His father was a member of the Na-Cho Nyak Dun First Nation. His background is a troubling one, a childhood marred by loss, abandonment, alcoholism, and abuse.

[24] Mr. Charlie and his two older siblings lost their mother to a house fire when Mr. Charlie was three or four years old. Both he and one of his sisters were in the home at the time of the fire, but his sister was able to get them out in time. His older sister notes the significant impact this loss had on Mr. Charlie. He recalls little of his mother but is aware that she was a residential school survivor who struggled with alcohol.

[25] Mr. Charlie knows less of his father, who he believes was not a constant figure in his early life, though his sister recalls their father paying significantly more attention to Mr. Charlie than to his sisters. Their father was an alcoholic and died in an alcohol-related, single vehicle accident when Mr. Charlie was nine or 10 years old.

[26] When their mother died, the Charlie children were taken in by their maternal grandparents. They were fortunate in their grandmother, a traditional woman with strong morals, who taught her grandchildren to hunt, trap, fish, and work the trap line. They were not so fortunate in their grandfather, who is described in the reports as extremely abusive. Mr. Charlie's sisters suffered sexual abuse, while Mr. Charlie was physically abused by their grandfather. Both sisters ran away when Mr. Charlie was around 7 years old. As they were not in a position to care for him, they could not take Mr. Charlie with them. His sister notes that Mr. Charlie was extremely hurt at being left behind and believed his sisters did not love him. The two girls were ultimately placed in foster care and raised in Alberta. Mr. Charlie reconnected with one of his sisters about 10 years ago and they have been working to develop a relationship. She

has shown her support for him in her participation in the preparation of both the PSR and the *Gladue* Report, and in her attendance in court. Mr. Charlie has little to no contact with his oldest sister.

[27] Mr. Charlie began running away from home and getting into trouble as a young teen. He notes that he was approximately 14 years old and did not recognize the value of the traditional lifestyle he had been raised in. He spent time in foster care over two periods between 1996 and 1998.

[28] Mr. Charlie dropped out of school in Grade 9, though he completed some upgrading while in custody and believes he obtained roughly his Grade 11 equivalency. He has completed numerous workplace certificates and has worked primarily seasonal jobs in the labour and construction fields, though gained some experience firefighting in his earlier years. Most recently, he worked as a carpenter's helper for the Little Salmon Carmacks First Nation until being laid off in November 2020. He is described by the Director of Capital Projects and Infrastructure as a “good employee”, who may have potential to achieve a permanent position in the future.

[29] Mr. Charlie is currently single, but is the father of three children; two daughters, ages 14 and 8, and a son, age 2. He has good relationships with the mothers of his daughters and is able to therefore maintain good relationships with those two of his children. He has less of a relationship with his son's mother but is able to see his son every couple of weeks. He indicates that he makes himself available for whatever his children or their mothers may need.

[30] The mother of his oldest daughter has provided a letter of support and been present in court. She describes Mr. Charlie as a huge support to his daughter and a reliable, hard worker, who helps her both financially and around the house as required. In addition to the letter of support, she advised the author of the PSR that her daughter is experiencing stress and anxiety at the thought of Mr. Charlie going to jail and being unavailable as a source of support for her. In addition to the letter provided, she advised the author of the *Gladue* Report that Mr. Charlie is a caring and helpful parent, and notes the close bond he has with his daughter.

[31] With respect to the abuse of substances, Mr. Charlie began drinking when he was 14 years of age. By age 20, he was an alcoholic. He reports that he is able to abstain when required, such as on days when he is with his children, but it is clear that alcohol continues to play a significant role in his life. His responses on the Problems Related to Drinking scale place him as having a severe problem with alcohol abuse.

[32] Mr. Charlie appears to recognize that he needs help to address this problem, that being the problem with alcohol, albeit his recognition is a more recent one. He did meet with counsellor Duane Esler on two occasions in March 2021 on a referral from this bail supervisor, but initial efforts to connect him to the Forensic Complex Care Team were unsuccessful, largely due to difficulty in contacting Mr. Charlie, who does not have a telephone. More recently, he has been attending AA meetings on Wednesdays in Carmacks and doing one-to-one counselling with Lauren Seabrook on Fridays. I am also advised that he is now connected with the Forensic Complex Care Team and has had four sessions with Mr. Witt, who has provided a letter indicating that Mr. Charlie has

now willingly engaged in counselling and is beginning to develop insight into his behaviour.

[33] In terms of available rehabilitative options, the *Gladue* Report writer has provided Mr. Charlie and the Court with a list of available support services and healing options both in the community and within the federal penitentiary system. I am also advised that ongoing counselling with the Forensic Complex Care Team can continue within the Territorial correctional system.

[34] With respect to his attitudes towards the offence, Mr. Charlie continues to deny having committed the offence.

[35] With respect to risk, Mr. Charlie scored as having a very high overall level of risk needs on the LS/CMI. I have absolutely no idea what those letters stand for, but it is a risk assessment tool for those of you who have not heard of it.

Positions of Counsel

[36] In terms of assessing the appropriate sentence to be imposed, counsel have provided very different positions. Crown seeks a penitentiary term of five years, a significant departure from the historical sentencing range in the Yukon. He bases his position primarily on the comments of the Supreme Court of Canada in the case that I referred to earlier. The name of that case is *R. v. Friesen*, 2020 SCC 9. Defence argues that a Territorial term of imprisonment of one to two years (12 to 24 months) plus a term of probation would be appropriate, noting that a penitentiary term would remove

Mr. Charlie from the Territory and his supports, thus hampering his longer-term rehabilitative prospects.

Case Law

[37] Counsel have provided a number of cases in support of their respective positions. Not all of the cases provided are on point. For example, the decision in *R. v. Colbourne*, 2013 ONCA 308, provided by defence, is unhelpful due to the lack of information regarding the circumstances upon which the sentence was based. Similarly, the two cases in which suspended sentences were imposed (*R. v. C.J.J.*, 2020 BCPC 201 and *R. v. Lariviere*, 2021 ABQB 432) provided by defence, are wholly unrealistic in light of the Yukon Court of Appeal decision in *R. v. Rosenthal*, 2015 YKCA 1, which held that a suspended sentence was not appropriate in a case of digital penetration on a sleeping adult victim, notwithstanding the lack of a criminal record, as it did not meet the principles of denunciation and deterrence.

[38] I should say, in noting that those cases are not on point, I am not suggesting that defence counsel was in any way suggesting to the Court that a suspended sentence was appropriate, it is just that the cases are of less value because they are outside of the established sentencing range.

[39] Some of the cases provided by Crown are equally distinguishable, such as the calculated, persistent, and predatory abuse of 11 victims, most of whom are well below the age of 14 and for whom the offender was in a position of trust in *R. v. J.J.P.*, 2018 YKSC 30 or the decision in *R. v. Skookum*, 2018 YKCA 2, which, while factually similar, involved an offender with two prior convictions for sexual assault — a significant

aggravating factor that is not present in this case — or the decision in *R. v. J.D.W.*, 2021 MBCA 49, involving an offender with a serious history of violence against women and girls who abused a position of trust in sexually assaulting his sleeping 7-year-old stepdaughter.

[40] In light of these differences, I think it is both unnecessary and not particularly helpful to do an overview of every single case that was given to me. I am sure most of you heard more about the cases than you wanted to on Monday. But I am going to highlight the cases that I think have some relevance to the decision that I need to make.

[41] Firstly, I am mindful of the recent decision of *Friesen*, that I have already referenced, in which the Supreme Court of Canada spoke at length about the need for increased sentences to reflect the gravity of sexual offences against children and the harm caused to child victims. *Friesen* requires courts to consider the impact of sexual offences on children not just in the present — so the effects they are experiencing now — but also the potential for reasonably foreseeable harms that will manifest in the future, which is, sadly, very common for sexual assault victims. The Supreme Court does indicate that sentencing ranges for adults ought not to be applied when sentencing cases involve child victims.

[42] As we discussed at length on Monday, the issue in this case is really about the impact of the *Friesen* decision on what has long been seen as the established sentencing range here in the Yukon, which was set out in the decision of *R. v. White*, 2008 YKSC 34, out of the Yukon Supreme Court, in which Gower J. determined the sentencing range for non-consensual sexual intercourse perpetrated against a sleeping

or unconscious victim to be between 12 months and 30 months in jail, a sentencing range that has been affirmed on more than one occasion by the Yukon Court of Appeal, including in the *Rosenthal* decision.

[43] Counsel have provided a number of cases decided pre-*Friesen* both from the Yukon and from elsewhere. I should say in terms of cases from elsewhere, you do find that across the country there are differences in the sentencing ranges that have been applied for various reasons that I will not go into today. Suffice it to say, the sentencing range in the Yukon of 12 to 30 months is not the same sentencing range that is applied in Manitoba, or in Nova Scotia. There may be some similarities in sentencing ranges but there are also some differences that you will find regionally.

[44] That being said, some of the (pre-*Friesen*) cases from out of the jurisdiction do fall within the *White* sentencing range. In *R. v. H.P.*, 2019 ONSC 6421, a decision of the Ontario Superior Court, the 24-year-old offender was found guilty after trial of non-consensual intercourse on his drunk and sleeping girlfriend, and was sentenced to 12 months in jail and two years' probation. There are distinguishing factors, however, including the relative youth of the offender who had no criminal record and was remorseful.

[45] In *R. v. Scinocco*, 2017 ONCJ 359, a decision of the Ontario Court of Justice, the 39-year-old accused was also sentenced post-trial to 12 months and two years' probation for partial vaginal penetration on a sleeping intoxicated victim. The offender was treated as a first-time offender but lacked remorse. The age of the victim in that case is unclear.

[46] The related Yukon decisions provided — and I mean the ones that are factually similar to this case — seem to fall towards the higher end of the *White* sentencing range.

[47] In *R. v. Menicoche*, 2016 YKCA 7, a decision out of the Yukon Court of Appeal, the 27-year-old accused anally penetrated the passed out 15-year-old victim. The Court of Appeal reduced the sentence of 23 months down to 17 months on the basis the sentencing judge placed inadequate weight on *Gladue* factors and rehabilitative prospects. Again, the youthful age of the accused plus those positive rehabilitative prospects would distinguish the case somewhat from the case at bar.

[48] In *R. v. Stewart*, 2012 YKSC 75, the Yukon Supreme Court sentenced a 33-year-old Aboriginal offender who pleaded guilty to two counts of sexual assault against sleeping intoxicated victims, one who was 19 years old, and the other 13 years old. Veale J. imposed 15 months with respect to the offence on the 19-year-old victim and 23 months with respect to the 13-year-old. Differences include the guilty pleas and lack of a criminal record, though the offender similarly lacked remorse and insight into his offending behaviour.

[49] In *R. v. Vanbibber*, 2016 YKTC 10, a case out of this Court, Luther J. — one of our deputy judges — imposed a 30-month sentence on a 44-year-old Aboriginal offender in relation to both vaginal and anal penetration of a 16-year-old victim. The case involved another offence on an adult victim for which the offender received 16 months. The offender did enter guilty pleas and the sentences were ultimately part of a joint submission, that being a submission which both Crown and defence have

presented jointly to the Court as being appropriate. Joint submissions are treated somewhat differently by the Court than a situation like this where counsel have very different positions.

[50] Ironically, the case that perhaps is most factually similar in terms not just of the circumstances of the offence but also of the offender is *White*, the case that set the sentencing range here in the Yukon, with the sole difference between the two cases being the age of the victim. The victim in the *White* case was 21 years of age as opposed to 16 years of age as in this case.

[51] In *White*, the 39-year-old Aboriginal offender had a dated criminal record with one conviction for violence, that being aggravated assault. He was convicted post-trial, was noted to be at high risk to reoffend, and had serious alcohol and drug problems but was seemingly uninterested in obtaining treatment. The Court imposed a sentence of 26 months, which brings us back to the question that I posed on Monday and earlier in this decision, which is: What is the impact of the *Friesen* case on the sentencing range set out in *White* in cases where the victim is under the age of 18?

[52] The *Friesen* decision just came out in 2020, so there are limited cases applying *Friesen* in similar circumstances to date for me to consider. The only Yukon case is the case of *R. v. Field*, 2020 YKSC 42, a decision out of the Yukon Supreme Court, in which the offender, a 49-year-old Aboriginal man, was sentenced for five separate sexual assaults, one of which involved an intoxicated sleeping 16-year-old victim.

[53] The Court imposed a sentence of 24 months on the count involving the child victim and 16 months on the counts involving adult victims. However, the sentences

were part of a larger joint submission of 10 years, so the individual sentences were how the judge chose to apportion 10 years as between the various offences. Given the number of offences for which the offender was sentenced, one would expect that the totality principle would have had some bearing on the joint submission and each of the individual sentences imposed, so it is hard to say how Justice Campbell might have sentenced on that offence if it was not part of a larger series of offences. It really is not open to me to speculate on what she might otherwise have done, but the sentence in that case for the offence on the 16-year-old was 24 months.

[54] In *R. v. Gordon*, 2021 NWTSC 25, a decision of the Northwest Territories ("NWT") Supreme Court, the Aboriginal offender sexually assaulted a 17-year-old victim by licking her vagina while she was sleeping. The Court imposed a 14-month sentence plus 30 months' probation. The offender had one prior conviction for common assault. However, unlike Mr. Charlie, the offender had entered a guilty plea, was genuinely remorseful, and had maintained sobriety for 14 months and engaged in significant counselling.

[55] In *R. v. Milne*, 2021 BCCA 166, a decision of the British Columbia Court of Appeal, a sentence of 12 months for the 24-year-old accused, who sexually assaulted his 17-year-old former girlfriend, was raised to 30 months on appeal. The youthful offender did enter a guilty plea. However, the sexual assault included binding, blindfolding, anal and vaginal penetration, it was videotaped, and it lasted for five hours.

[56] In *R. v. Okemaysim*, 2021 SKCA 33, the Saskatchewan Court of Appeal upheld a sentence of 40 months imposed on an Aboriginal offender who committed a sexual

assault on a sleeping 13-year-old complainant. He was convicted post-trial. However, the offender was found to be in a breach of trust situation, as the 13-year-old was in his care. The case does arise from a jurisdiction in which the pre-*Friesen* sentencing range had a starting point of three years, which is higher than the pre-*Friesen* sentencing range here in the Yukon. The task for me is to determine the impact of *Friesen* on the sentencing range in the Yukon.

[57] *R. v. Parr*, 2020 NUCA 2, is a case in which the Nunavut Court of Appeal reduced a five-year sentence to four years for an Aboriginal offender who sexually assaulted a 17-year-old victim. However, some of the circumstances of both offence and offender were not entirely clear to me from the decision, which makes it difficult to consider how close or distinguishable it might be from this case. And the case, again, is also reflective of the higher pre-*Friesen* sentencing range in Nunavut.

Application of Law to Positions of Counsel

[58] I will address the position, firstly, advanced by defence counsel which is premised largely on the impact of both *Gladue* factors and of rehabilitation on the sentence to be imposed.

[59] While *Gladue* is certainly a factor which must be given weight in these proceedings, the question of rehabilitation is more problematic.

[60] Firstly, most of the cases — both pre-*Friesen* and to some extent post-, if I consider the NWT decision in *Gordon* — are cases in which rehabilitation has been a significant factor. They involve, by and large, either more youthful offenders or

offenders who have taken significant steps towards their rehabilitation. While Mr. Charlie's steps towards rehabilitation are positive and should certainly be encouraged, they are also very recent. I do not have a proven record before me, so it is difficult to assess, as I said, the longer-term prospects. One would view what he has done to date differently than an individual as in some of these cases who has spent 12, 14, or more months in counselling and maintaining sobriety. Even pre-*Friesen*, I am not of the view that consideration of rehabilitation would necessarily have placed Mr. Charlie at the low end of the *White* sentencing range, that being 12 months.

[61] Furthermore, changes to the *Criminal Code* have mandated that the principles of denunciation and deterrence be given priority in cases involving victims under the age of 18 and who are vulnerable by virtue of being both female and Aboriginal, as in this case. So while rehabilitation is still a factor to be considered, the primacy of denunciation and deterrence plus the *Friesen* case are such that I think we would really need more exceptional steps towards rehabilitation to push Mr. Charlie to the lower end of the sentencing range.

[62] In considering the Crown's position on sentence, I note that the five years proposed would double the upper range set out in *White*. Furthermore, none of the cases provided by Crown that are on point, even those post-*Friesen*, have imposed a five-year sentence as suggested by the Crown. When we discussed on Monday the basis on which the Crown believed that I could so dramatically increase the *White* sentencing range, Crown indicated they were relying on the comments of the Supreme Court of Canada in *Friesen*, including at para. 114, in which the Court states:

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

[63] However, this general guidance provided by the Court does not do so in reference to what factors necessarily drive the sentence to be imposed, which is a pretty crucial question when you consider the dramatically broad range of behaviour that is captured under the umbrella of s. 271.

[64] Earlier, in the same paragraph, the Court states that:

> ... It is not the role of this Court to establish a range or to outline in which circumstances such substantial sentences should be imposed. ...

[65] They are giving general guidance, saying the sentencing range needs to move and the range needs to move up. The question for me, as a Territorial Court judge, is: How far can I move it in all of the circumstances? It must be remembered that I am still bound by cases out of superior courts in the Yukon, including *White* and *Rosenthal*, and the sentencing range of 12 to 30 months set out in *White*. While *Friesen* does urge trial courts to raise the sentencing range for sexual offences against children, there is the question, again, about just how far I can, of my own motion, raise that sentencing range without reference to other established cases in which the question has been litigated, particularly cases in appellate or superior courts.

[66] Indeed, the Nunavut Court of Appeal in *Parr* raised the concern that, in that case, the trial judge appeared to have, without reference to any law at all, determined by

himself that the cases reported in Nunavut did not reflect the emerging law and he jumped over the established sentencing range that was presented to him by counsel.

[67] It is certainly arguable that the *Friesen* case is the case that I could rely on, but it offers very general guidance, and, in the face of the massive range of possible factors that may arise in various different types of sexual offences, it is a little difficult at this stage to determine just what that long-term impact of *Friesen* is going to be.

[68] We are still in the very early stages. There is limited law post-*Friesen* to really guide my decision about just how far I can or should go. So, in my view, I come back to the *White* decision, which, as I have noted, is very similar in terms of both the circumstances of the offence and the offender but with the difference being the age of the victim. It was a youthful adult of 21 years of age in that case. In this case, we are dealing with a younger, more vulnerable 16-year-old.

[69] If I am trying to figure out the impact that *Friesen* has, the easiest way to do that in terms of the existing law is to ask myself: What is the impact of the aggravating factor of C.J.'s age on the sentencing range in *White* and, more particularly, on the sentence that was imposed in *White*?

[70] I should point out that I still have to consider the impact of *Gladue* factors in this particular case. The Supreme Court of Canada has stressed the need for us to look for ways to reduce the involvement of Indigenous offenders in the system, and very often that is by reducing the sentences imposed. So, again, I am back to the difficult balancing of conflicting considerations, the very negative impact of the offence on this young woman when she was still a child, and the *Gladue* factors that flow from

Mr. Charlie's very problematic upbringing which, I would say, has a lot to do with why he is in the system at all.

[71] The question then is: What do I do with the *Friesen* case in terms of increasing the sentence because of the age of the victim but also bearing in mind those *Gladue* factors?

[72] After considering all of the circumstances and all of the conflicting factors, I am satisfied that the appropriate balance can be reached by increasing the 26-month sentence that was imposed in *White* by imposing an additional six months to reflect the more aggravating circumstance of the age of C.J. in this particular case. Accordingly, the sentence that I am imposing will be 32 months' incarceration in a federal penitentiary.

[73] In addition to the custodial term, there are a number of mandatory orders that I am required to impose. They are:

1. that Mr. Charlie provide such samples of his blood as are necessary for DNA testing and banking;

2. that he comply with provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for a period of 20 years; and

3. that he be prohibited from having, in his possession, any firearm, ammunition, or explosive substances for a period of 10 years, pursuant to s. 109 of the *Criminal Code*.

[74] I am also required to consider the imposition of a victim surcharge. Given his custodial status, I am satisfied that it is appropriate to waive the $200 surcharge in this case.

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RUDDY T.C.J.