Citation: *R. v. Jim*, 2021 YKTC 67

Date: 20211210
Docket: 19-00698
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**
Before Her Honour Judge Orr

REGINA

v.

PATRICK JIM

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

Appearances:
Lauren Whyte — Counsel for the Crown
Malcolm E.J. Campbell — Counsel for the Defence

## REASONS FOR SENTENCE

[1] ORR T.C.J. (Oral): This matter has been before the Court for a lengthy period of time. Patrick Jim was charged with two offences, namely that on or about December 7, 2019, at Whitehorse, in the Yukon Territory, he did commit a sexual assault on A.P. contrary to s. 271 of the *Criminal Code*, (the "*Code*"); and, at the same time and place that he did for a sexual purpose touch A.P., a person under the age of 16 years, directly with a part of his body, to wit: his hand, contrary to s. 151 of the *Code*.

[2] Mr. Jim's first appearance was December 13, 2019, and there was a consent release at that time. The Crown initially proceeded by way of Indictment in this matter but re-elected summary conviction on February 26, 2020, at which time Mr. Jim had pleaded not guilty to both charges and the matter had been set for a three-day trial from September 28 to 30, 2020.

[3] On September 28, 2020, Mr. Jim entered a guilty plea to the charge of sexual assault contrary to s. 271(b). A Pre-Sentence Report ("PSR") was ordered and defence counsel ordered a *Gladue* Report.

[4] The matter was initially adjourned to December 11, 2020 for sentencing, and following subsequent court appearances, was adjourned on consent of counsel to follow other trial matters set for June 2021.

[5] It was then adjourned to September 10, 2021 for sentencing, and an updated PSR was requested.

[6] On August 30, 2021, defence counsel filed a notice of application seeking an order that s. 271(b) of the *Code*, and specifically the six-month mandatory minimum sentence therein, was invalid as well as the provisions of s. 742.1(b) which precluded the availability of a conditional sentence.

[7] The matter was further adjourned to today's date for hearing on the motion and sentence. Both Crown and defence have filed written arguments and the supporting case law.

[8] An Agreed Statement of Facts was filed in this matter on December 11, 2020. As it is short, I will replicate it here.

> 1. On 7 December, 2019, twelve year old [A.P.] was staying at [redacted], in Whitehorse, Yukon Territory.
> 2. She went to sleep around midnight in a bedroom at the back of the house.
> 3. Several hours later, she awoke to Patrick Jim touching her bum over her leggings and underwear.
> 4. She pretended to remain asleep and moved further away on the bed.
> 5. Mr. Jim touched her again with his hand over her leggings, and then under her pants four or five times. On the last occasion, he touched her bum and vagina, but there was no penetration.
> 6. She got up and went to the bathroom which ended the incident.
> 7. She texted some friends about what had just happened, and then she left the house to spend the rest of the night at one of her friend's home.
> 8. Mr. Jim turned himself into the RCMP on 12 December, 2019.

[9] The *Gladue* Report was prepared at Mr. Jim's request, and filed with the Court for sentencing that was set for December 11, 2020. A PSR was also prepared for the same date. An updated PSR was filed with the Court for the September 10, 2021 sentencing date.

[10] Counsel for the accused has filed a notice of application seeking an order declaring that the six-month mandatory minimum sentence in s. 271(b) of the *Code* infringes s. 12 of the *Charter of Rights and Freedoms* (the *"Charter"*); is not saved by s. 1 of the *Charter*; and is of no force and effect, pursuant to s. 52(1) of the *Constitution Act*, 1982.

[11] Secondly, the claim is that s. 742.1(b) of the *Code* infringes s. 7 of the *Charter*; is not saved by s. 1 of the *Charter*; and is of no force and effect, pursuant to s. 52(1) of the *Constitution Act*.

[12] The defence application raises the first issue to be addressed, which is the scope of the remedy being sought.

[13] In the case of *R. v. Lloyd*, 2016 SCC 13, Chief Justice McLachlin stated:

> 15 The law on this matter is clear. Provincial court judges are not empowered to make formal declarations that a law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*; only superior court judges of inherent jurisdiction and courts with statutory authority possess this power. However, provincial court judges do have the power to determine the constitutionality of a law where it is properly before them. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 316, "it has always been open to provincial courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statute."
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> 16 Just as no one may be convicted of an offence under an invalid statute, so too may no one be sentenced under an invalid statute. Provincial court judges must have the power to determine the constitutional validity of mandatory minimum provisions when the issue arises in a case they are hearing. This power flows directly from their statutory power to decide the cases before them. The rule of law demands no less.
>
> 17 In my view, the provincial court judge in this case did no more than this. Mr. Lloyd challenged the mandatory minimum that formed part of the sentencing regime that applied to him. As the Court of Appeal found, he was entitled to do so. The provincial court judge was entitled to consider the constitutionality of the mandatory minimum provision. He ultimately concluded that the mandatory minimum sentence was not grossly disproportionate as to Mr. Lloyd. The fact that he used the word "declare" does not convert his conclusion to a formal declaration that the law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*.

[14] It should also be noted throughout the defence factum, that it refers to the mandatory minimum sentence in respect of a charge under s. 151(b) and, at other times, to s. 271(b). This was raised at the start of this proceeding and was corrected by defence counsel as the accused in this case has pleaded guilty to a charge pursuant to s. 271(b).

[15] Section 12 of the *Charter* guarantees that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[16] In the cases of *R. v. Nur*, 2015 SCC 15, and *Lloyd*, the Supreme Court of Canada has clearly set out the test to be applied and the process to be followed in considering a s. 12 application.

[17] At paras. 22 to 24 of the *Lloyd* decision, the Court states:

> 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.
>
> 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 [page149] 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.

[18] Quoting further from *Lloyd*:

> 18 To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as a condition precedent to considering the law's constitutional validity, would place artificial constraints on the trial and decision-making process.
>
> 19 The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the *Constitution Act, 1982*. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given

> or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction.

[19] The references to the provincial court apply equally to the Territorial Court in which I am sitting here today.

[20] The first question is to consider the principles of sentencing in this matter. In order to consider those, we need to consider some information with respect to Mr. Jim.

[21] At the time of the offence, Mr. Jim was 23 and one-half-years old. He is now 25 and one-half, having been born in Whitehorse, Yukon, on June 13, 1996. Mr. Jim is a citizen of the Champagne and Aishihik First Nation ("CAFN"), which the *Gladue* Report indicates is a self-governing Yukon First Nation with traditional territories in Southwest Yukon and Northwest British Columbia. As children are born into their mothers' clan, Mr. Jim belongs to the Crow Clan. The *Gladue* Report indicates that the clan system is central to CAFN people and provides an important sense of identity.

[22] The *Gladue* Report also sets out specific and historical events in a general way but also experienced directly by Mr. Jim and his family that today we call the systemic factors that courts have been called upon to recognize when dealing with Aboriginal offenders. Most of Mr. Jim's maternal aunts and uncles, including his mother, attended residential schools. By this point in time, courts can certainly take judicial notice of the devastating intergenerational effects of the residential schools, where children were taken from their families, forbidden to learn about, or engage in, their language or their culture, and where many were subject to physical, emotional, and sexual violence.

When they returned to their communities, they had few life skills, little or no connection with their culture, and often turned to alcohol and drugs to forget their experiences.

[23] The *Gladue* Report prepared in this matter documents the direct impact on Mr. Jim growing up in these circumstances and the difficulties his mother had in providing a suitable home for her family. He was fortunate to have an older brother, an aunt and uncle, and grandparents who provided for him on a regular basis.

[24] Defence counsel today highlighted the support that those individuals had been able to provide to him.

[25] Although he dropped out of school for a period of time, during which he started smoking marijuana, he went back to school and graduated from the Independent Learning Centre in 2016, as a 20-year-old. The principal of that school had very positive comments about Mr. Jim and noted that he had an incredible gift for music.

[26] In 2017, Mr. Jim was beaten with a baseball bat and suffered injuries as a result. While family members have speculated that he may have suffered a brain injury as a result, it does not appear from any of the materials filed in this matter, or reports prepared, that there has ever been a medical diagnosis to confirm such an injury.

[27] Mr. Jim was in several relationships which did not work out. He has a daughter who is now about five years of age but with whom he had had limited contact during the period of time when she and her mother had moved away from Whitehorse. The indications are that he has now been able to reconnect with her since she has moved

back to this area and that he is again, now that he is working, providing some support for her as he had previously.

[28] The indications are that he is now in a new relationship and that that is a much more positive one than some of his previous relationships. His current partner is aware of his circumstances and is supportive of him.

[29] Mr. Jim acknowledged that, during the 2018 to 2019 period, he was abusing alcohol and drugs on a frequent, if not daily, basis. When the *Gladue* Report and PSRs were prepared for the December 2020 court appearance, they indicated that Mr. Jim had been sober from alcohol for nine months. In addition, he was indicating at that time an interest in getting some counselling for his drug and alcohol abuse. A culturally appropriate program was available to Mr. Jim and, in fact, a spot in it was guaranteed for him if he had called to make arrangements voluntarily. According to the updated PSR prepared in September 2021, Mr. Jim was again drinking several times a week and continuing to use marijuana to relax himself and help him sleep.

[30] There is no indication in any of the reports or submissions of counsel that Mr. Jim has taken any treatment, and I asked that question specifically today. The indication today, as well, from his worker, after I had raised those issues, was that there is a program that would be available for him and there is funding available.

[31] Both the *Gladue* Report and the PSRs provide a great deal of detail about Mr. Jim, his background, and his circumstances. I have read all of those materials. I have not gone into all the details but I certainly found that those reports were quite helpful in providing the Court with information about Mr. Jim and his circumstances.

[32] The purpose and principles of sentencing are set out in ss. 718 to 718.2 of the *Code*.

[33] Section 718 provides as follows:

> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

I will deal with that in more detail.

> (b) to deter the offender and other persons from committing offences;

In other words; to impose a sentence on this offender that will bring home to him, specifically, that this type of behaviour is not acceptable. The general deterrence aspect is so others, who may be of a mind to engage in this type of behaviour will realize that there are consequences and sanctions should they do so and be apprehended for their actions (that is what we mean about when we talk about deterrence).

> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;

There are issues in this matter indicating rehabilitation needs to be addressed. It is quite clear from the *Gladue* Report that there are a number of matters that Mr. Jim should be engaged in counselling in respect of: alcohol and drug addictions; grief

counselling; and there are a number of things that are set out in there that I will get into later.

> (e) to provide reparations for harm done to victims or to the community; and

Certainly that is a very significant aspect in this matter. Again, when I talk about the impact on the victim, I am going to deal with this further.

> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Mr. Jim has acknowledged in court today his regret and his remorse in respect to this matter. That is certainly a little clearer than the comments that he had made in the PSR, which I have already addressed earlier today when counsel were making their submissions. The comments in the PSR certainly caused some degree of concern. His comments were clarified by counsel stating that as he was under the influence of alcohol at the time, Mr. Jim was not fully aware of what he had done in respect of this matter but through his guilty plea he was accepting that this is what had occurred. He was not challenging the veracity of the complainant in this matter or the statement that A.P. had provided to the police. Mr. Jim had entered his guilty plea on that basis.

[34] Section 718.01 indicates that:

> When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[35] Many of the cases that have been filed talk about the very general principles of sentencing. This is an amendment to the *Code* in 2005 and essentially, as the case law will demonstrate, what it indicates is that while in many situations when a Court is sentencing an individual, they have to decide which of the six matters that are set out in s. 718 should be given priority, if any, or whether it is a balancing act. When we are dealing with children, Parliament has made it quite clear the primary considerations are denunciation and deterrence. As has already been noted earlier today by Crown counsel, rehabilitation, while a factor, is not to be the primary factor or consideration in sentencing, given Parliament's direction.

[36] Much has been said about the Supreme Court of Canada's decision in *R. v. Friesen*, 2020 SCC 9. I think the intention of the Supreme Court of Canada was that much should be said about their decision. Anyone reading that decision should not be left in any doubt as to what the Supreme Court of Canada was saying. They articulated it quite clearly. They articulated their points at length.

[37] In respect of this provision under s. 718.01, the Supreme Court of Canada said in the *Friesen* decision:

> 50 To effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. Getting the wrongfulness and harmfulness right is important. As Pepall J.A. recognized in *R. v. Stuckless*, 2019 ONCA 504, 146 O.R. (3d) 752 ("*Stuckless (2019)*"), failure to recognize or appreciate the interests that the legislative scheme of offences protects can result in unreasonable underestimations of the gravity of the offence (paras. 120, 122, 130 and 137; see also Marshall, at pp. 219-20). Similarly, it can result in stereotypical reasoning filtering into the sentencing process and the consequent misidentification and misapplication of aggravating and mitigating factors (J. Benedet, "Sentencing for Sexual Offences Against

Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences" (2019), 44 Queen's L.J. 284, at pp. 288 and 309; M. M. Wright, *Judicial Decision Making in Child Sexual Abuse Cases* (2007), at pp. xii-xiii and 39). Properly understanding the harmfulness will help bring sentencing law into line with society's contemporary understanding of the nature and gravity of sexual violence against children and will ensure that past biases and myths do not filter into the sentencing process (*Stone*, at para. 239; *R. v. Barton*, 2019 SCC 33, at para. 200).

...

56 This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that, as this Court held in *R. v. McCraw*, [1991] 3 S.C.R. 72, “may often be more pervasive and permanent in its effect than any physical harm” (p. 81).

...

60 Sexual violence causes additional harm to children by damaging their relationships with their families and caregivers. Because much sexual violence against children is committed by a family member, the violence is often accompanied by breach of a trust relationship (*R. v. D.R.W.*, 2012 BCCA 454, 330 B.C.A.C. 18, at para. 41). If a parent or family member is the perpetrator of the sexual violence, the other parent or family members may cause further trauma by taking the side of the perpetrator and disbelieving the victim (see "The 'Statutory Rape' Myth", at p. 292). Children who are or have been in foster care may be particularly vulnerable since making an allegation can result in the end of a placement or a return to foster care (see *R. v. L.M.*, 2019 ONCA 945, 59 C.R. (7th) 410). Even when a parent or caregiver is not the perpetrator, the sexual violence can still tear apart families or render them dysfunctional (*R. v. D. (D.)* (2002), 58 O.R. (3d) 788 (C.A.), at para. 45). For instance, siblings and parents can reject victims of sexual violence because they blame them for their own victimization (see *Rafiq*, at para. 38). Victims may also lose trust in the ability of family members to protect them and may withdraw from their family as a result (*Rafiq*, at paras. 39-41).

61 The ripple effects can cause children to experience damage to their other social relationships. Children may lose trust in the communities and people they know. They may be reluctant to join new communities, meet new people, make friends in school, or participate in school activities (C.-A. Bauman, "The Sentencing of Sexual Offences against Children" (1998), 17 C.R. (5th) 352, at p. 355). This loss of trust is compounded when members of the community take the side of the offender or humiliate and ostracize the child (*R. v. Rayo*, 2018 QCCA 824, at para. 87 (CanLII); *R.*

> *v. T. (K.)*, 2008 ONCA 91, 89 O.R. (3d) 99, at paras. 12 and 42). Technology and social media can also compound these problems by spreading images and details of the sexual violence throughout a community (see *R. v. N.G.*, 2015 MBCA 81, 323 Man.R. (2d) 73).
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> 62 The *Criminal Code* recognizes that the harm flowing from an offence is not limited to the direct victim against whom the offence was committed. Instead, the *Criminal Code* provides that parents, caregivers, and family members of a sexually victimized child may be victims "in their own right" who are entitled to present a victim impact statement (B. Perrin, *Victim Law: The Law of Victims of Crime in Canada* (2017), at p. 55; see also *Criminal Code*, ss. 2 ("victim") and 722).

[38] In this case, we do, in fact, have the Victim Impact Statement filed by the complainant's mother setting out the impact this matter has had and the concerns that she has had and the difficulties as a result. The statement indicated that her daughter was here in the Yukon because of serious illness of the child's father and was staying with family at the time that this matter occurred. As one would expect, it includes the concerns by the mother as to whether or not she should have let her daughter come here and how this matter could have occurred when she was in the care of another individual.

[39] Quoting from *Friesen*:

> 64 Beyond the harm to families and caregivers, there is broader harm to the communities in which children live and to society as a whole. Some of these costs can be quantified, such as the social problems that sexual violence against children causes, the costs of state intervention, and the economic impact of medical costs, lost productivity, and treatment for pain and suffering (see *Hajar*, at para. 68; *R. v. Goldfinch*, 2019 SCC 38, at para. 37; United Nations, *Report of the independent expert for the United Nations study on violence against children*, U.N. Doc. A/61/299, August 29, 2006, at p. 12). In particular, children who are victims of sexual violence may be more likely to engage in sexual violence against children themselves when they reach adulthood (*D. (D.)*, at paras. 37-38). Sexual violence against children can thus fuel a cycle of sexual violence that results in the proliferation and normalization of the violence in a given

> community (Standing Senate Committee on Human Rights, *The Sexual Exploitation of Children in Canada: the Need for National Action*, November 2011 (online), at pp. 10, 30 and 41). In short, the costs that cannot be quantified are also profound. Children are the future of our country and our communities. They deserve to have a childhood free of sexual violence (*Hajar*, at para. 44). When children become victims of sexual violence, "[s]ociety as a whole is diminished and degraded" (*Hajar*, at para. 67).
>
> 65 The protection of children is one of the most fundamental values of Canadian society. Sexual violence against children is especially wrongful because it turns this value on its head. In reforming the legislative scheme governing sexual offences against children, Parliament recognized that children, like adults, deserve to be treated with equal respect and dignity (Badgley Committee, vol. 1, at p. 292; Fraser Committee, vol. 1, at p. 24, and vol. 2, at p. 563). Yet instead of relating to children as equal persons whose rights and interests must be respected, offenders treat children as sexual objects whose vulnerability can be exploited by more powerful adults. There is an innate power imbalance between children and adults that enables adults to violently victimize them (*Sharpe*, at para. 170, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; *L. (D.O.)*, at p. 440, per L'Heureux-Dubé J.). Because children are a vulnerable population, they are disproportionately the victims of sexual crimes (*George*, at para. 2). …

[40] *Friesen* then provides some statistics with respect to sexual offences against children. There have also been statistics filed in this matter.

> 66 Children are most vulnerable and at risk at home and among those they trust (*Sharpe*, at para. 215, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; *K.R.J.*, at para. 153, per Brown J.). More than 74% of police-reported sexual offences against children and youth took place in a private residence in 2012 and 88% of such offences were committed by an individual known to the victim (*Police-reported sexual offences against children and youth in Canada, 2012*, at pp. 11 and 14).

[41] Certainly the Supreme Court of Canada has set out, in fairly specific terms, just exactly why these matters are of such great concern and why s. 718.01, when there are offences against a child, is a very serious matter.

[42] Section 718.04 of the *Code* provides that:

> When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[43] Again, the Supreme Court of Canada had a lot to say about that in the *Friesen* decision, and I quote para. 68:

> 68 Sexual violence also has a disproportionate impact on girls and young women. Like the sexual assault of adults, sexual violence against children is highly gendered (*Goldfinch*, at para. 37). The "intersecting inequalities of being young and female" thus make girls and young women especially vulnerable to sexual violence…Sexual violence against children thus perpetuates disadvantage and undermines gender equality because girls and young women must disproportionately face the profound physical, emotional, psychological, and economic costs of the sexual violence (see *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 669; *Goldfinch*, at para. 37). Girls and young women are thus "still punished for being female" as a result of being disproportionately subjected to sexual violence (see The Hon. C. L'Heureux-Dubé, "Foreword: Still Punished for Being Female", in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (2012), 1, at p. 2).

[44] And then, reading from para. 70:

> 70 Children who belong to groups that are marginalized are at a heightened risk of sexual violence that can perpetuate the disadvantage they already face. This is particularly true of Indigenous people, who experience childhood sexual violence at a disproportionate level (Statistics Canada, *Victimization of Aboriginal people in Canada, 2014* (2016), at p. 10). Canadian government policies, particularly the physical, sexual, emotional, and spiritual violence against Indigenous children in Indian Residential Schools, have contributed to conditions in which Indigenous children and youth are at a heightened risk of becoming victims of sexual violence (see British Columbia, Representative for Children and Youth, *Too Many Victims: Sexualized Violence in the Lives of Children and Youth in Care* (2016), at p. 8 ("*Too Many Victims*"); *The Sexual Exploitation of Children in Canada: the Need for National Action*, at pp. 29-33). In particular, the over-representation of Indigenous children and youth in the child welfare system makes them especially vulnerable to sexual violence (*Too Many Victims*, at pp. 11-12). We would emphasize that,

> when a child victim is Indigenous, the court may consider the racialized nature of a particular crime and the sexual victimization of Indigenous children at large in imposing sentence (T. Lindberg, P. Campeau and M. Campbell, "Indigenous Women and Sexual Assault in Canada", in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (2012), 87, at pp. 87 and 98-99).

[45] Certainly that applies to the case here, as the victim in this matter is an Indigenous person.

[46] Section 718.1 of the *Code* provides that:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[47] While this is certainly something that has been discussed by many cases, sticking with the *Friesen* decision, because it dealt with this, the Supreme Court of Canada stated at paras. 75 and 76 of *Friesen*:

> 75 In particular, courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle. Accurately understanding both factors is key to imposing a proportionate sentence (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 43-44). The wrongfulness and the harmfulness impact both the gravity of the offence and the degree of responsibility of the offender. Taking the wrongfulness and harmfulness into account will ensure that the proportionality principle serves its function of "ensur[ing] that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused" (*Nasogaluak*, at para. 42).
>
> 76 Courts must impose sentences that are commensurate with the gravity of sexual offences against children. It is not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities (see *M. (C.A.)*, at para. 80; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 35). We thus offer some guidance on how courts should give effect to the gravity of sexual offences against children. Specifically, courts must recognize and give effect to (1) the inherent

> wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.

[48] The Court went on to say that the Court has to be very careful in considering the harm because, in many cases, when we are dealing with a young victim it may well be some time before the specific signs of that harm manifest themselves. In many cases, what has been seen through the studies that have been conducted is that, many times, the impact cannot be measured until the person has become an adult and then it is quite clear as to these harms that have been occasioned by the offence.

[49] The Supreme Court of Canada has set that out specifically in its decision in *Friesen* and stated:

> 84 ... courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence. ...

[50] As to the gravity of the offence in this particular matter, under s. 271(b) of the *Code*, I think it is important to note there are two parts to the punishment in respect of this section as to the appropriate sentence.

> 271 Everyone who commits a sexual assault is guilty of
>
> …
>
> (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

[51] Parliament has clearly distinguished that the maximum sentence available, if the person is 16 years of age or older, is 18 months and there is no minimum sentence, but, if the complainant is under the age of 16 years, the maximum penalty increases to two years less a day and that there is a minimum sentence of six months.

[52] I think it would be fair to say — and the case law is supportive — that Parliament has indicated through that distinction in penalties that offences against children under the age of 16 is an extremely serious matter and has imposed a much more significant sentence than what might otherwise be imposed under this provision for a person of 16 years of age or older.

[53] Section 718.2 of the *Code* says that:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender ...

[54] Section 718.2 then sets out a number of factors. The one that would be relevant in respect to this matter would be (a)(ii.1):

> evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> ...

That would be considered to be an aggravating factor present in this matter.

[55] Section 718.2(b) indicates that:

> a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[56] As counsel are well aware, no two cases are the same. Facts are different. The offender's circumstances are different as well as whether the offender has a record, or does not have a record. There are usually some differences between each of the cases. The task for the Court is to look at the various precedents that have been referred to, to draw the appropriate analogies, and the appropriate distinctions, in order to tailor a sentence to meet the specific circumstances of the offender who has committed the offence before the Court.

[57] Both counsel reviewed a number of decisions that were filed in this matter. I am not going to go through them in detail. None of the cases that were referred to, were identical. There were some similarities and there were some significant differences with respect to many of those cases.

[58] Many of the cases were decided before the Supreme Court of Canada's decision in *Friesen*. Today, I was provided with a Manitoba Court of Appeal decision, *R. v. Alcorn*, 2021 MBCA 101 that was issued yesterday. It certainly would seem to indicate that the Manitoba Court of Appeal has taken to heart the direction of the Supreme Court of Canada, which, essentially, had indicated to provincial courts of appeal that they needed to look at the range of sentences that they were indicating were appropriate for charges of this nature, and that it was time for those sentences to be adjusted upward.

[59] In *Alcorn*, the Manitoba Court of Appeal increased a sentence significantly. The facts are not the same as what we have here but it does indicate the direction of that Court of Appeal as to how they are applying *Friesen*.

[60] A number of the cases that were referenced by counsel were where the individuals were not Indigenous. That is a factor that has to be considered and I will deal with that in a few minutes.

[61] In *R. v. Kapolak*, 2020 NWTTC 12, the accused was diagnosed with an intellectual disability (Fetal Alcohol Spectrum Disorder ("FASD")). Expert evidence was called in respect of that matter as to the impact that his cognitive difficulties had on him and on the commission of the offence.

[62] In *R. v. Kirby*, 2020 ONCJ 33, the accused had a psychological disorder. There was a report in respect of that matter. That case involved one touch on the buttocks over clothing. That case was decided before the Supreme Court of Canada's decision in *Friesen*.

[63] In *R. v. D.A.D.*, 2021 YKTC 20, the accused was charged with touching over clothing. In that case, the risk to reoffend was low. In the present case, according to the PSR, it is considered to be average.

[64] The case of *R. v. Pye*, 2019 YKTC 21 was decided before *Friesen*. Those facts were more aggravating and there were references in that case as to whether or not there was consent. *Friesen* would certainly have direct application to their comments as

to how that was to be considered. In that case, the accused was 21 years old and the victim was 14 years old.

[65] In *R. v. G.K.*, 2021 YKTC 17, again, a decision of this Court, the offender was considered to be at low risk to reoffend. That was a decision after *Friesen* but the cases that were referenced in that decision were decided prior to that time.

[66] The cases that were provided set out a range of sentences for me to consider.

[67] Section 718(c):

> (c) where consecutive sentences are imposed ...

[68] That is not the case here. We have one single count.

[69] Section 718(d):

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> e) 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.

[70] In considering that provision, the Supreme Court of Canada in *Friesen* stated:

> 90 The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable…
>
> 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).

[71] At para. 98, of *Friesen*, the Court referred to the history of Parliament repeatedly increasing sentences for sexual offences against children, noting that Parliament has repeatedly signalled society's increasing recognition of the gravity of sexual offences against children in the years that followed, starting in 1987.

[72] In *Friesen*, the Court has indicated that sentences should be increased, as these are very serious matters, and that the courts need to impose sentences that reflect that.

[73] At paras. 144 and 145, and I think this is quite applicable to this case, the Court in *Friesen* stated:

> 144 Specifically, we would strongly caution courts against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation. There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be [TRANSLATION] "relatively benign" (see *R. v. Caron Barrette*, 2018 QCCA 516, 46 C.R. (7th) 400, at paras. 93-94). Some decisions also appear to justify a lower sentence by labeling the conduct as merely sexual touching without any analysis of the harm to the victim (see *Caron Barrette*, at paras. 93-94; *Hood*, at para. 150; *R. v. Iron*, 2005 SKCA 84, 269 Sask.R. 51, at para. 12). Implicit in these decisions is the belief that conduct that is unfortunately referred to as "fondling" or [TRANSLATION] "caressing" is inherently less harmful than other forms of sexual violence (see *Hood*, at para. 150; *Caron Barrette*, at para. 93). This is a myth that must be rejected (Benedet, at pp. 299 and

> 314 Wright, at p. 57). Simply stating that the offence involved sexual touching rather than penetration does not provide any meaningful insight into the harm that the child suffered from the sexual violence.
>
> 145 Third, we would emphasize that courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced. Of course, increases in the degree of physical interference increase the wrongfulness of the sexual violence. However, sexual violence against children remains inherently wrongful regardless of the degree of physical interference. Specifically, courts must recognize the violence and exploitation in any physical interference of a sexual nature with a child, regardless of whether penetration was involved (see Wright, at p. 150).

[74] I have considered those principles of sentencing, the direction of the Supreme Court of Canada, the accused's circumstances, which I have already referred to, and that this is an offence that occurred just a little over two years ago, almost to the day.

[75] In December 2020, in the PSR and in the *Gladue* Report, Mr. Jim acknowledged that he had a problem. Mr. Jim had indicated that until this offence occurred, he did not think he had any problem with alcohol but he recognized after the commission of this offence that he did, and that he wanted to attend treatment. Funding was available. According to those reports, all that he had to do was to voluntarily apply. He has not done so.

[76] Today, I was advised by the courtworker that funding is still available for him to take that program.

[77] Access to the services has not been an issue, and resources has not been an issue in this matter. However, in two years, Mr. Jim has not done anything about one of the primary indications as to a factor that led to the commission, or that was implicit in

the commission of this offence, namely that he was significantly under the influence of alcohol at the time that he sexually assaulted the victim in this matter.

[78] What is of great concern in this matter is the fact that, to his credit, Mr. Jim indicated that he had a period of nine months of sobriety. That was indicated in the *Gladue* Report of December 2020. But in the PSR of September 2021, the indications were that he was no longer sober. He was drinking several times a week and, according to Mr. Jim, he was drinking to reduce stress when he would come home from work and he was using marijuana on a regular basis in order to help him relax and sleep.

[79] The information today is this is still the situation. I specifically asked whether or not he had taken any treatment during that period of time, given the indications that he was willing to do so. In fact, at the time that he had indicated that in December 2020, because of the injury to his hand, that he was not working, and would have had the opportunity to do that without losing any work. That report was prepared leading up to December when he had been off work for some significant period of time.

[80] There are concerns throughout all of the reports — the *Gladue* Report, the PSR, and the updated PSR — that are expressed by Mr. Jim himself about the environment that he is in, where alcohol is present at times, and at times is a negative factor, and his desire to move out of that environment. But in the two years — and it is a condition of his bail, his release order — it does not appear that any application has ever been made to vary the release orders in order to enable him to do so. He has continued in that environment and he has made very specific comments in those reports about the

difficulties that that has caused for him at various times because of what is occurring there.

[81] As I say, alcohol was indicated to be a significant factor in the commission of the offence before the Court. Mr. Jim claims that because of his use and abuse of alcohol on the occasion of his offence, he has little recall of the event, and due to the fact that he was drinking quite heavily leading up to this point in time.

[82] As I have noted, it is to Mr. Jim's credit that he acknowledged the seriousness of the offence. He made efforts to stop drinking, and he had a significant period of time of sobriety. But, he has gone back to the drinking and he has not taken any treatment, and that certainly is a matter of concern. The PSR notes that he is of average risk to reoffend.

[83] It is, again, to Mr. Jim's credit that he has no prior criminal record. He seems to enjoy his current work in construction. The letter from June 2021 from his employer indicates that he is a good worker. He has indicated in the various reports he has an interest in furthering his training and education and wants to get his Red Seal. That would be of benefit to him.

[84] There is a letter of support from Mr. Jim's current girlfriend, who is supportive, and from his mother, who indicates the support that he has been to her.

[85] It is noted that Mr. Jim has one child. He is reconnecting with that child. He is now again providing support since he has gone back to work and has been for most of last year.

[86] The *Gladue* factors are certainly quite prevalent in this matter. They are well documented in the *Gladue* Report, as well as in the PSRs, with the systemic and personal consequences to Mr. Jim in respect of those matters.

[87] As I have already noted, we also have to consider the *Gladue* factors in respect to the victim in this matter, given her status as an Indigenous person. She, too, has certainly suffered from those circumstances.

[88] This is a matter that is very concerning.

[89] We have a 12-year-old child staying at her grandmother's home. It appears from the Victim Impact Statement, she was already upset because her father had a very significant medical issue and that is why she was there in order to spend some time with him. So, she was upset from that. She was staying at her grandmother's home and she was 12 years old. A.P. was asleep in bed at night, where a child should expect to be asleep and safe in her grandmother's home.

[90] Mr. Jim, age 24 — 23 and one-half at the time — went in and touched A.P. over her clothing and under her clothing in a sexual manner and committed a sexual assault. She was the one who was able to leave the area and stop the incident. It was not Mr. Jim who discontinued. A.P. got up, left, and immediately reported it. It is to Mr. Jim's credit that he turned himself in to the police, and, it appears on the day of the trial, entered a guilty plea, without much prior notice to the complainant. There was an order that she was going to have to testify by CCTV in respect of the matter. She certainly was extremely vulnerable, sleeping. She is an Indigenous person, as is Mr. Jim, in this matter.

[91] With respect to the *Gladue* factors, one of the main considerations that the Court has to consider is the over-incarceration of Indigenous persons in our correctional facilities.

[92] When I consider all of these factors, it is certainly my view, from reviewing the cases, considering the principles of sentencing in this matter, that the range of penalty that would be appropriate in this case, given all these factors, would be a sentence in the range of 6 to 10 months in a Correctional facility.

[93] As has been noted by the Supreme Court of Canada in *Lloyd*, if considering the constitutionality of a mandatory minimum provision would not have any impact on the sentence in the case, then the Court does not have to consider that. In my view, this is not an appropriate case in which a conditional sentence should be imposed. I would not impose a conditional sentence in this matter even if it was to be available.

[94] Under s. 742 of the *Code*, I have to be satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing as set out in ss. 718 to 718.2.

[95] With respect to the issue of endangering the safety of the community, I am not satisfied that serving a sentence in this matter in the community would not endanger the safety of the community, given the assessment in the PSR that Mr. Jim is of average risk to reoffend; the fact that in two years since the commission of the offence he has not taken any treatment for alcohol or abuse of any other substances; that, while he had

a period of sobriety, he is back drinking again; and that alcohol was a significant factor in the commission of the offence.

[96] There are two components to s. 742. Since the Code uses “and”, both must be met. I have to be satisfied as well that serving the sentence in the community would be consistent with the fundamental purpose and principles of sentencing. The principles of sentencing that are primary in this matter are denunciation and deterrence as set out by s. 718.01 and s. 718.04. Applying the direction of the Supreme Court of Canada in *Friesen*, they have spelled out the various considerations for the Court in that regard.

[97] As I have noted, that does not mean that you ignore the *Gladue* principles and the direction in *R. v. Ipeelee*, 2012 SCC 13, and *R. v. Gladue*, [1999] 1 S.C.R. 688. However, in this particular case, I do not feel that this is an appropriate case for the sentence to be served in the community.

[98] As such and considering the range of sentence that I indicated would be appropriate in this matter, I do not, according to the Supreme Court of Canada in *Lloyd*, need to deal with whether or not the mandatory minimum sentence that is in this matter is contrary to the *Charter*, as a violation of s. 12, and therefore, I decline to do so.

[99] Considering all the matters that I have referred to — the *Gladue* Report, the PSR, the updated PSR, the submissions of Crown and defence, the many cases that have been referred to, considering the principles of sentencing that I have already elaborated on, from ss. 718 to 718.2, I believe that the appropriate sentence in this matter would be a period of seven months to be served in a correctional facility.
Mr. Jim, will you stand please.

[100] Upon your release from custody, you will be placed on probation for a period of two years.

[101] The terms of the probation are that you are to:

1. Keep the peace and be of good behaviour;

2. Appear before the court when and if required to do so;

3. Immediately notify the Probation Officer if there is any change of your address, your place of employment, education, or training;

[102] Those are the statutory conditions and they remain in effect throughout the period of the probation.

[103] The following conditions are additional and they remain in effect unless you come back before the Court and the Court changes them. You are to:

4. Report to and be under the supervision of a Probation Officer within two working days from your release from custody, and thereafter, at such times and places as directed by the Probation Officer;

5. Refrain absolutely from having any contact in any manner whatsoever with the victim in this matter, A.P.;

6. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues:

- substance abuse,
- alcohol abuse,
- grief counselling,
- any other issues that may be identified by your Probation Officer,

and you are to provide consents to release information to your Probation Officer regarding your participation in any program that you may have been directed to do pursuant to this condition;

[DISCUSSIONS]

7. Do not attend at any known place of residence, employment or education of A.P. during the term of the probation order.

[DISCUSSIONS]

[104] The primary purpose of the probation order, Mr. Jim, is to ensure, first of all, no contact with the victim but equally importantly the counselling, assessment, and treatment that needs to be undergone for your benefit, as well as that of ensuring protection of the public. There are a lot of unresolved issues that you need to deal with and, as well, the addiction issues need to be dealt with so that you would be able to maintain your sobriety, since that was a significant factor in this matter.

[DISCUSSIONS]

[105] There will be a DNA order in this matter for the taking of samples for the DNA databank. The order will indicate that you have the right to speak to counsel. Counsel will explain to you that you have to comply or they can forcibly take a sample from you. They can videotape it. They take you to a private area and what they do is they prick your finger, there's a drop of blood, they will put it on a slide, send it to Ottawa to the National DNA Databank, and it remains there for a period of time. That is what the order means.

[106] There will also be a 10-year *SOIRA* order in this matter. That requires you, Mr. Jim, to report as soon as you are released from custody to the appropriate place where they are going to take information from you and you are required to report there for a period of 10 years. They collect information from you with respect to where you are at, your circumstances, and if you fail to attend or report or if you give them false information then you can be charged for failing to comply with the directions of that order.

[107] I am going to waive the victim surcharge in respect of this matter, given the circumstance of Mr. Jim and the sentence that is being imposed in this matter.

[DISCUSSIONS]

[108] Regarding the s. 151 charge, that charge has now been stayed by the Crown.

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ORR T.C.J.