SUPREME COURT OF YUKON

Citation: *R v Jim*, 2022 YKSC 34

Date: 20220805
S.C. No. 21-AP014
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND

PATRICK JIM

APPELLANT

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

Before Justice E.M. Campbell

Counsel for the Respondent — Lauren Whyte

Counsel for the Appellant — Amy Steele

REASONS FOR DECISION
(Summary Conviction Appeal)

INTRODUCTION

[1] In late 2019, Patrick Jim (also known as Paddy Jim) was charged with touching a young adolescent victim in a sexual manner both over and under her pants, contrary to s. 271(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*"). The Crown

proceeded summarily. Mr. Jim pleaded guilty to sexual assault and was sentenced to seven months of imprisonment to be followed by two years of probation.

[2] Mr. Jim appeals his sentence, arguing the sentencing judge committed errors in principle that impacted his sentence. He has applied to adduce fresh evidence on appeal. As part of his appeal, Mr. Jim challenges the mandatory minimum sentence of six months' imprisonment set out in s. 271(b), which the sentencing judge declined to entertain based on the sentence she determined to be fit, and seeks to have the term of imprisonment imposed converted to a conditional sentence order. Alternatively, if the appeal is denied, Mr. Jim seeks a stay of execution of the custodial portion of the sentence imposed on him due to a change in circumstances since the imposition of the sentence.

Facts

The Offence

[3] The parties filed an agreed statement of facts at sentencing. In summary, on December 7, 2019, the 12-year-old victim, A.P., who was asleep in a bedroom at a house she was staying in Whitehorse, awoke to the appellant touching her bum over her leggings and underwear. She pretended to remain asleep while moving further away in the bed. The appellant touched her again with his hand over her leggings, and then under her clothing four or five times. On the last occasion, he touched her bum and her vagina, but did not penetrate her. The incident ended when she got up and went to the bathroom. She texted some friends about what had just happened, and then left the house to spend the rest of the night at the home of one of her friends. The appellant turned himself into the RCMP on December 12, 2019.

Chronology in First Instance

[4] Mr. Jim entered his guilty plea to the s. 271(b) charge on September 28, 2020, on the first day of his three-day trial in this matter, before the trial started. At the time, a pre-sentence report ("PSR") was ordered and a *Gladue* report requested by defence. The sentencing hearing was adjourned a number of times on consent to, among other things, follow other court matters.

[5] In August 2021, defence counsel at sentencing filed and gave written notice that Mr. Jim intended to challenge at sentencing the constitutional validity of the six-month mandatory minimum sentence in s. 271(b) of the *Code* and the correlating unavailability of a conditional sentence under s. 742.1(b).

[6] At the sentencing hearing, on December 10, 2021, counsel for Mr. Jim argued the court should find the six-month mandatory minimum sentence in s. 271(b), when the victim is under the age of 16, offends s. 12 of the *Canadian Charter of Human Rights and Freedoms,* Part 1 of the *Constitution Act, 1982* (the "*Charter*"), and is not saved by s. 1 of the *Charter*. He challenged the constitutional validity of the mandatory minimum sentence on the basis of Mr. Jim's personal circumstances as well as on the basis of hypothetical situations. Counsel argued the appropriate sentence for Mr. Jim was a period of imprisonment to be served in the community (a conditional sentence), which, pursuant to s. 742.1(b), is unavailable when the offence for which the offender is being sentenced is punishable by a minimum term of imprisonment. Counsel did not specifically argue the unconstitutionality of s. 742.1(b).

[7] While recognizing the presence of *Gladue* factors and the objective of rehabilitation, the sentencing judge concluded that an appropriate sentence for the

appellant was seven months incarceration, plus two years of probation, considering the circumstances of the offence and the importance of the objectives of denunciation and deterrence in cases of sexual offences against children. She also determined that a conditional sentence was not appropriate in Mr. Jim's case because she was not satisfied that allowing him to serve his sentence of imprisonment in the community would not endanger the safety of the community. She also concluded a conditional sentence would not be consistent with the fundamental purpose and principles of sentencing. Based on her conclusions, the sentencing judge determined it was unnecessary to analyze the constitutionality of the mandatory minimum sentence.

[8] On December 22, 2021, Mr. Jim was released on bail pending appeal. In May 2022, Mr. Jim entered a residential addiction treatment program, which he was still attending at the time of the hearing of this appeal on May 25, 2022. His attendance at the treatment program is the subject of his application to adduce fresh evidence on appeal.

Background of the Appellant

[9] A *Gladue* report completed in December 2020, a PSR dated December 7, 2020, and a PSR update dated September 8, 2021, providing information on Mr. Jim's personal circumstances, were filed at sentencing.

[10] Mr. Jim was 23 years of age at the time he committed the offence. He was 25 when he was sentenced on December 10, 2021. Mr. Jim is a citizen of the Champagne and Aishihik First Nation. The *Gladue* report states that Mr. Jim's mother as well as his maternal aunts and uncles attended residential school. The report details the damaging negative impacts the residential school system had on Mr. Jim's family and his

upbringing. Mr. Jim's parents separated when he was two years old and his father has had little involvement in his life. Mr. Jim's mother experienced difficulties providing a stable home environment for Mr. Jim. Fortunately, he had other family members who assisted him regularly. When Mr. Jim was 12 years of age, he and one of his brothers were adopted by his aunt and her husband. He lived with them for three years, while his mother was in treatment. He also spent a lot of time with his maternal grandfather who taught him how to hunt, fish, trap, and dance.

[11] Although Mr. Jim dropped out of school for a period of time, he returned to school and graduated from the Independent Learning Centre when he was 20 years old.

[12] In 2017, he suffered injuries when he was beaten with a baseball bat. Although family members suspect that he may have incurred a brain injury as a result of this beating, no medical diagnosis has been made.

[13] Mr. Jim has a five-year-old daughter who lives with her mother. Although he had limited contact with his daughter for a period of time when she was residing in another community, he reconnected with her when she moved back to Whitehorse with her mother, and, at the time of sentencing, he was working and providing support.

[14] At the time of sentencing, Mr. Jim was in a positive relationship with a supportive partner who filed an undated letter of support. This letter, as well as an undated letter of support from Mr. Jim's mother, and a June 29, 2020 letter of support regarding his employment, all of which are included in the appellant's book of documents, were also in front of the sentencing judge.

[15] Mr. Jim stated he was heavily under the influence of alcohol at the time he committed the offence. He acknowledged that during the 2018 to 2019 period he

abused alcohol and, up until the death of his cousin in 2018, drugs on a frequent, if not daily, basis.

[16] Mr. Jim had been sober for a number of months while awaiting sentencing. However, Mr. Jim reported to the author of the updated PSR of September 2021, that he had started drinking again, once or twice per week, after a difficult day at work. Mr. Jim also reported using cannabis to help him cope with stress.

[17] Mr. Jim did not have a criminal record at the time of sentencing.

Issues on Appeal

[18] The issues on appeal are:

i. Should the proposed fresh evidence be admitted?

ii. Did the sentencing judge commit an error in principle that impacted the sentence imposed on Mr. Jim?

iii. Is the mandatory minimum sentence of six months' imprisonment in s. 271(b) of the *Code* when the victim is under the age of 16 years contrary to s. 12 of the *Charter*? If so, is the mandatory minimum sentence justifiable under s. 1 of the *Charter*?

iv. If the sentence appeal is denied, should the Court stay the execution of the custodial portion of Mr. Jim's sentence?

i. Should the proposed fresh evidence be admitted?

Positions of the Parties

The Appellant

[19] Counsel for the appellant, who was not counsel at the sentencing hearing, advances a number of arguments in support of the appellant's position that the sentencing judge committed errors in principle that affected the sentence imposed on him. Counsel acknowledges that denunciation and deterrence must be given primary

consideration in sentencings involving sexual offences against children. However, counsel submits that the sentencing judge gave insufficient weight to the principles of proportionality, which remains the fundamental sentencing principle, and parity. Counsel also submits that the sentencing judge failed to properly consider Mr. Jim's strong prospect of rehabilitation. Additionally, counsel contends that the sentencing judge erred by giving insufficient weight to the *Gladue* principles, and all reasonable alternatives to jail for Aboriginal offenders pursuant to s. 718.2(e) of the *Code*.

[20] While counsel does not contest the length of the sentence imposed by the sentencing judge, she submits that a conditional sentence would be the fit sentence to impose on the appellant.

[21] Counsel seeks to introduce fresh evidence regarding treatment that Mr. Jim has undertaken since being released on bail pending appeal. The proposed evidence consists of confirmation that, on May 2, 2022, Mr. Jim was admitted to Cedars at Cobble Hill, an accredited addictions treatment centre; that Mr. Jim has been fully engaged for 23 days in the addiction treatment program, and that he has been working one-on-one with a certified sexual addiction therapist. The estimated length of the program is between 45 and 55 days.

[22] The fresh evidence also consists of confirmation from Mr. Jim's employer that he has been granted a leave of absence to attend the full duration of the treatment program and that he will be able to return to work full time after he completes treatment.

[23] Counsel for the appellant submits the proposed fresh evidence meets the test for admission of fresh evidence on appeal as set out in *Palmer v The Queen*, [1980] 1 SCR 759 ("*Palmer*"), and should be considered in determining whether the sentencing judge

erred in principle in imposing sentence on him and the overall fitness of his sentence. Counsel submits that this new information was not available at the time of sentencing and, as a result, counsel would not have been in a position to provide it to the sentencing judge. Counsel submits that Mr. Jim's consumption of alcohol and lack of counselling or treatment for substance abuse and other underlying issues, played an important role in the sentencing judge's determination that a conditional sentence was not appropriate. Counsel submits this new evidence supports Mr. Jim's strong prospect of rehabilitation. Therefore, counsel submits the proposed fresh evidence is highly relevant to the matters at issue on appeal. Counsel submits that it would not be logical for an appeal court to ignore fresh evidence that has a bearing on the circumstances of an offender when assessing whether the sentencing judge erred with respect to the sentence she imposed.

The Respondent

[24] Counsel for the respondent submits the proposed fresh evidence does not meet the due diligence and relevancy requirements of the test set out in *Palmer.*

[25] Counsel submits that fresh evidence consisting of post-sentence counselling and treatment is not relevant to the central issue on this appeal, which is whether the sentencing judge erred in principle in imposing sentence on the appellant. Counsel submits that an appeal court should only consider that type of fresh evidence after concluding that the sentence imposed by the sentencing judge warrants appeal intervention, and for the sole purpose of imposing a sentence the appeal court deems fit. Counsel submits that the sentencing judge did not commit an error in principle in sentencing the accused and that she imposed a fit sentence. Therefore, the proposed

fresh evidence is not relevant and should not be admitted as it does not meet the *Palmer* test. Counsel submits that finding otherwise would amount to giving the appellant a chance to reargue his sentence.

[26] Counsel submits the appellant did not exercise due diligence because the record reveals that, prior to sentencing, the appellant had the opportunity to attend the same counselling and treatment program he is now attending but chose not to. Counsel adds that it is not in the interests of justice to admit the proposed fresh evidence to preserve the integrity of the sentencing process, as the finality of that process would be lost if parties were able to routinely augment the sentencing record on appeal.

Analysis

[27] It is not disputed that if an appeal court, including a summary conviction appeal court, believes it appropriate to admit fresh evidence on a sentence appeal, it will be done on the basis that it is in the interests of justice to do so (*R v Lévesque*, 2000 SCC 47 ("*Lévesque"*) at para. 17; *R v Lacasse*, 2015 SCC 64 ("*Lacasse*") at para. 116 (*citing Lévesque*); *R v Angelillo*, 2006 SCC 55 at para 12).

[28] The Court in *Lacasse* at para. 115, reiterated that the criteria a court is to consider in deciding to receive fresh evidence on a sentence appeal were set out in *Palmer*. First, a court should generally not admit fresh evidence if it could have been adduced at trial, although this criterion is somewhat more relaxed in criminal cases. Second, the evidence to be adduced must be relevant in that it bears upon a decisive or potentially decisive trial issue. Third, the evidence must be credible in that it is reasonably capable of belief. Fourth, the evidence must be such that if believed, it could reasonably be expected to have affected the result.

[29] As stated in *Lévesque*: “[i]n accordance with the last three criteria, a court of appeal may admit only evidence that is relevant and credible, and could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result” (para. 18).

[30] However, failure to meet the first criterion, the exercise of due diligence, will not always be fatal (*Lévesque* at para. 19). Compelling evidence may be admitted despite the absence of due diligence if it is found to be in the interests of justice to do so.

[31] Nonetheless, due diligence is “an important factor that must be taken into account in determining whether it is in the interests of justice to admit or exclude fresh evidence” (*Lévesque* at para. 19).

[32] The integrity of the criminal system is an important consideration encompassed in the due diligence criterion. As stated by Doherty J.A. in *R v M(PS)*, (1992), 59 OAC 1 at 411, whose remarks were found by the majority in *Lévesque*, at para. 19, to be equally applicable to the admission of fresh evidence on a sentence appeal:

> …The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused’s interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(*d*) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of “fresh” evidence on appeal has been stressed: *McMartin v. The Queen*, *supra*, at p. 148.

> The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.

[33] Therefore, the first question that arises on this appeal concerns the second criterion of the *Palmer* test. Is the proposed fresh evidence, which relates to post-sentence conduct (in this case attendance at treatment and counselling) relevant to determining whether the sentencing judge committed an error in principle that impacted the sentence she imposed on Mr. Jim?

[34] In *R v Sipos*, 2014 SCC 47, Cromwell J. for the majority addressed the issue of proposed fresh evidence relating to post-sentencing events. In doing so, he stated that while courts must recognize that life goes on pending appeal, finality in the criminal process is also a relevant consideration in determining whether the interests of justice require the admission of the fresh evidence. He also noted there are no "hard and fast, detailed rules" or categories the courts can turn to in conducting the balancing exercise required under the *Palmer* test in light of the "infinite variety" of post-sentence circumstances or events that may arise.

> [30] Fresh evidence addressing events that have occurred between the time of sentencing and the time of the appeal may raise difficult issues which bring competing values into sharp relief. On one hand, we must recognize, as Doherty J.A. put it in *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (Ont. C.A.), at para. 166, that "[a]ppeals take time. Lives go on. Things change. These human realities cannot be ignored when the Court of Appeal is called upon to impose sentences well after the event." However, we must equally pay attention to the institutional limitations of appellate courts and the important value of finality. Routinely deciding sentence appeals on the basis of after-the-fact developments could both jeopardize the integrity of the criminal process by undermining its finality and surpass the appropriate bounds of appellate review: *Lévesque*, at

> para. 20; *R. v. Smith* (2005), 376 A.R. 389 (C.A.), at paras. 21-25.
>
> [31] Given the almost infinite variety of circumstances that may arise, it is neither desirable nor possible to formulate any hard and fast, detailed rules about the sorts of after-the-fact evidence that should or should not be considered in all cases. The abundant appellate jurisprudence cannot be reduced to a tidy set of rules, but rather reflects the courts' attempts to balance these at times competing values in light of particular and widely varying sets of circumstances: see, e.g., *R. v. Riley* (1996), 150 N.S.R. (2d) 390 (C.A.); *R. v. Faid* (1984), 52 A.R. 338 (C.A.); *R. v. Jimmie*, 2009 BCCA 215, 270 B.C.A.C. 301; *R. v. Halliday*, 2012 ONCA 351 (CanLII); and generally, C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at §§ 4.49 ff.; *R. v. N.A.S.*, 2007 MBCA 97, 220 Man. R. (2d) 43; *R. v. Martin*, 2012 QCCA 2223 (CanLII). At the level of principle, the approach set out in *Lévesque* and *Angelillo* strikes the balance between the competing values and, when applied thoughtfully to the particular circumstances before the court, provides sufficient flexibility to ensure that the appellate process is both responsive to the demands of justice and respectful of the proper limits of appellate review.

[35] Counsel for Mr. Jim points to the decision in *R v Char*, 2007 BCCA 346 ("*Char*"), in which the Court of Appeal for British Columbia allowed fresh evidence on a sentence appeal, to support Mr. Jim's position. In *Char*, the appellant was sentenced to 16½ months' imprisonment on three counts of theft under $5,000 and two counts of breach of an undertaking related to incidents of shoplifting. After the guilty pleas were entered, the sentencing judge inquired whether pre-sentence reports would be requested for sentencing; defence counsel declined.

[36] Ms. Char appealed her sentence on the basis the sentencing judge had erred, and the sentence was unfit. Appeal counsel had gathered additional evidence she asked the Court of Appeal to consider. The fresh evidence included a *Gladue* report; psychiatric evidence that the appellant suffered from psychosocial deprivation, brain

injury, chronic depression, and, likely, FASD (Fetal Alcohol Spectrum Disorders); a letter of support from the Chief of the appellant's First Nation; and information that the appellant had completed several programs with a treatment organization, while she was on remand awaiting sentencing, that had accepted her for residential treatment and further assistance, if the appellant sought after care. In allowing the fresh evidence, the Court of Appeal noted that the sentencing judge was looking for information such as what was submitted on appeal but that none was presented to her. The Court of Appeal added that the absence of available "professional expert attention" (para. 16) and viable alternatives outside the correctional system led to the lengthy sentence of imprisonment the judge imposed.

[37] The Court of Appeal ultimately allowed the fresh evidence in the interests of justice. After admitting the fresh evidence, the Court of Appeal determined that the sentence did not give sufficient weight to rehabilitation and, as a result, was unfit in all of the circumstances. The Court substituted the initial sentence by a sentence of six months' imprisonment followed by a one-year probationary term focussing on treatment and rehabilitation. The Court also stated that, as the appellant had already served two thirds of her six-month sentence, she would be entitled to statutory release immediately and able to embark on her probationary period.

[38] Counsel for the appellant submits this decision establishes that fresh evidence regarding counselling and treatment can be considered at the stage of determining whether a sentence is unfit or the sentencing judge erred in principle.

[39] Counsel for the respondent submits, to the contrary, that the Court of Appeal's finding that the sentence was "unfit in all of the circumstances" (para. 19) reveals that

the court determined the sentence to be unfit prior to considering the fresh evidence in crafting a fit sentence.

[40] Despite counsel for the respondent's able submissions, I am of the view that the order in which the decision was rendered reveals the Court of Appeal first admitted the fresh evidence and then considered it in determining whether the sentence was unfit. However, in my view, *Char* is not a case where the fresh evidence consists of post-sentence conduct or events because most, if not all, of the fresh evidence admitted on appeal existed and could have been presented to the sentencing judge had defence counsel requested and obtained it on behalf of Ms. Char. Therefore, it does not directly address the issue of post-sentence counselling efforts that is before me.

[41] In opposing Mr. Jim's request, counsel for the respondent relies on the decision of *R v Jimmie*, 2009 BCCA 215 ("*Jimmie*"), where the Court of Appeal for British Columbia dismissed the appellant's application to admit fresh evidence on her sentence appeal. In *Jimmie*, the appellant was sentenced to two years plus a day for robbery. The materials sought to be admitted as fresh evidence related to programs the appellant had successfully completed in custody since being sentenced, and a report from a registered psychologist outlining the progress the appellant had made during her post-sentence incarceration.

[42] In refusing to admit the fresh evidence, the Court of Appeal stated, at para. 15:

> Ms. Jimmie is to be commended for the progress she has made in these rehabilitative efforts toward lasting sobriety. However, this evidence, having arisen after the sentencing hearing, cannot reasonably be expected to have affected the issue of whether the sentence imposed was demonstrably unfit. …

[43] In addition, at para. 16, the Court of Appeal noted "generally speaking, the proper forum for the consideration of post-sentencing rehabilitation efforts is with Correctional Service of Canada. I would not accede to Ms. Jimmie's request to adduce fresh evidence."

[44] Although this decision is not binding on me, I find it persuasive as it specifically addresses the type of post-sentence evidence the appellant seeks to adduce in this case. Additionally, it considers the balancing exercise a court is required to undertake when confronted with evidence that an offender has taken positive steps in their life, and finality, which plays an important role in preserving the integrity of the criminal process.

[45] The record reveals Mr. Jim could have attended a residential treatment program to address his substance abuse issues prior to sentencing but did not. The evidence was that during the lengthy period of time between his guilty plea and the sentencing hearing he had not engaged in counselling or programming of any nature. However, at the time the appeal was argued and while on bail pending appeal, he had started and completed close to one-half of a residential addiction treatment program. As in *Jimmie*, Mr. Jim should be commended for the work on himself he has started, which will no doubt give him important tools to utilize for the rest of his life that will benefit him, his family and society. However, I am of the view that Mr. Jim's post-sentence participation in residential substance abuse treatment and sex offender counselling does not affect the issue of whether the judge erred in principle in weighing the sentencing principles and objectives in determining the sentence to impose on him.

[46] Mr. Jim was sentenced less than a year ago. The proposed fresh evidence, while encouraging, would not be sufficient to answer or alleviate issues or concerns raised by the sentencing judge with respect to Mr. Jim's substance abuse issues, which was a direct contributing factor in the commission of the offence, and his ability, when he returns home, to remain sober. It remains that Mr. Jim's consumption of alcohol was a factor in the commission of the offence and the PSR noted that, while further assessment was recommended, he was at an average risk to reoffend with respect to sexual offences.

[47] In addition, the importance of finality in the criminal process militates against admitting post-sentence evidence of treatment or counselling. Otherwise, offenders could routinely seek to reargue their sentence on appeal based simply on positive steps, programming or counselling they have sought and taken after sentencing.

[48] This is not to say that post-sentence evidence of counselling, treatment or positive steps taken by an offender should never be admitted on appeal. I note the Court of Appeal in *Jimmie* stated that "generally" that type of fresh evidence is not admissible, leaving the door open to an exceptional case where it would be in the interests of justice to admit it.

[49] *R v MacDonald*, 2013 ONCA 295 ("*MacDonald*"), is an example of a decision where fresh evidence of post-sentence positive steps taken by an offender and a change in circumstances were considered on appeal in determining the fitness of the original sentence. In that case, five years had passed since the imposition of the sentence; the offender had complied with all the conditions of his probation order; he had paid the fines imposed; and he had successfully completed two years of medical

school. The Court of Appeal for Ontario determined it would not be in the public interest "to put a road block in the way of the appellant's professional career" (para. 5). The court allowed the appeal, varied the original sentence and granted the conditional discharge the appellant was denied at first instance.

[50] This is not a case like *MacDonald*, where the long passage of time coupled with a lasting change in circumstances militated in favour of the admission of the fresh evidence on appeal.

[51] Mr. Jim's application to admit fresh evidence is dismissed.

ii. Did the sentencing judge commit an error in principle that impacted the sentence imposed on Mr. Jim?

Positions of the Parties

The Appellant

[52] Counsel for the appellant submits that Mr. Jim is a young, first-time Indigenous offender, and that the sentencing judge erred in giving insufficient weight to the principles of parity, proportionality, s. 718.2(e) of the *Code* and *Gladue* principles, as well as the appellant's prospect of rehabilitation in determining the sentence to impose on him. Counsel submits these errors in principle impacted the sentence imposed on Mr. Jim.

[53] Counsel submits that, even though priority must be given to the objectives of denunciation and deterrence in sentencing offenders for sexual offences involving children, the Supreme Court of Canada in *R v Friesen*, 2020 SCC 9 ("*Friesen*"), reiterated that a sentencing judge retains discretion to give significant weight to other factors, including rehabilitation and *Gladue* factors, in arriving at a fit sentence in accordance with the fundamental principle of proportionality.

[54] Counsel submits that the sentencing judge failed to observe the principle of parity in disregarding the body of persuasive caselaw emanating from the Yukon and the Northwest Territories that have found that the three-month mandatory minimum sentence in s. 151(b), for the offence of sexual interference, and the six-month mandatory minimum sentence in s. 271(b), for the offence of sexual assault where the victim is under 16, offend s. 12 of the *Charter* and are not saved by s. 1. Counsel submits that, in some of those cases, conditional sentences were imposed.

[55] In addition, counsel for the appellant submits that, although the sentencing judge acknowledged the existence of *Gladue* factors, she failed to give *Gladue* principles and the appellant's strong prospect of rehabilitation adequate weight when determining a fit sentence for him. In doing so, she failed to give effect to s. 718.2(e) of the *Code*.

[56] Counsel for the appellant acknowledges that the length of the sentence imposed on Mr. Jim is not outside the range of appropriate sentences. However, counsel argues that, had the sentencing judge properly considered *Gladue* principles as well as the principles of parity, rehabilitation, and proportionality, she would have concluded that a conditional sentence was a fit sentence to impose in this case.

[57] Counsel also submits that, had the sentencing judge not erred in principle, she would have had to engage in a review of the constitutionality of the six-month mandatory minimum sentence under s. 271(b), and the resulting unavailability of a conditional sentence pursuant to s. 742.1(b), which she declined to do. She would have then found the mandatory minimum sentence provision infringed s. 12 of the *Charter* and could not be saved by s. 1.

The Respondent

[58] Counsel for the respondent submits that the sentencing judge did not err in principle in sentencing the appellant. Counsel submits that the sentencing judge properly weighed the principles and objectives of sentencing, and applied them to the specific circumstances before her in determining a fit sentence.

[59] Counsel for the respondent submits that the appellant has failed to explain how the sentencing judge gave insufficient weight to the principles of proportionality and rehabilitation.

[60] Counsel for the respondent submits that there is no basis to support the appellant's position that the sentencing judge incorrectly considered and applied the principle of parity. Counsel for the respondent submits that the sentencing judge not only referenced the principle of parity in her decision, but properly and thoroughly reviewed many of the cases provided, not only by the appellant but also the respondent, in which offenders with similar circumstances had received sentences higher than the mandatory minimum sentence. In addition, counsel submits it was appropriate for the sentencing judge to cautiously approach sentencing decisions rendered prior to the Supreme Court of Canada's decision in *Friesen*.

[61] Counsel for the respondent submits that the sentencing judge clearly and properly considered the *Gladue* principles. Counsel submits that the sentencing judge did not err simply because she reached the conclusion that a conditional sentence was not appropriate in this case.

Standard of Review

[62] Sentencing judges have “broad discretion to impose the sentence they consider appropriate within the limits established by law” (*R v Lacasse*, 2015 SCC 64 at para. 39). Sentencing is a highly individualized process that reflects the circumstances of the offence and the offender (*R v Ipeelee*, 2012 SCC 13 (“*Ipeelee*”) at paras. 36 and 38).

[63] In *Ipeelee* at para. 38, the Supreme Court of Canada stated that a sentencing judge must have “sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender” (see also *R v Suter*, 2018 SCC 34 (“*Suter*”) at para. 46).

[64] Considerable deference must therefore be accorded to the decision of the sentencing judge (*Lacasse* at paras. 39-41; and *Ipeelee* at para. 38). Appellate courts “must generally defer to sentencing judges’ decisions” (*Friesen* at para. 25).

[65] An appellate court will only be justified in intervening with a sentence if:

> (i) the sentencing judge imposed a sentence that is demonstrably unfit (*Lacasse* at paras. 41, 43 and 44; *Suter* at para. 24; *R v Joe*, 2017 YKCA 13 at para. 36; *R v Agin*, 2018 BCCA 133 at para. 48); or
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> (ii) the sentencing judge erred in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor, and that error had an impact on sentence (i.e. the error materially contributed to the sentence imposed (*Friesen* at para. 26; *Suter* at para. 24) or, in other words, the sentence would have been different absent the error (*R v Agin* at paras. 52, 56 and 57);

[66] In either case, "the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances" (*Suter* at para. 24).

[67] In *Friesen* at para. 26, the court further stated about the power to intervene on appeal with respect to an error in principle:

> … Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

[68] An appellate court must keep in mind that: “[a]s long as the sentence meets the sentencing principles and objectives codified in ss. 718 to 718.2 of the *Criminal Code*, and is proportionate to the gravity of the offence and the level of moral blameworthiness of the offender, it will be a fit sentence” (*Suter* at para. 27).

[69] An appellate court should not intervene simply because it may have a different opinion on what constitutes the most appropriate sentence or would have weighed the relevant sentencing factors differently (*Lacasse* at paras. 39, 40, 41 and 49).

[70] However, as stated in *Ipeelee* at para. 39

> There are limits, however, to the deference that will be afforded to a trial judge. Appellate courts have a duty to ensure that courts properly apply the legal principles governing sentencing. In every case, an appellate court must be satisfied that the sentence under review is proportionate to both the gravity of *the offence* and the degree of responsibility of *the offender*. … (emphasis in original)

Analysis

(a) Did the sentencing judge fail to accord due weight to the principle of parity?

[71] The sentencing judge specifically referenced s. 718.2(b) of the *Code*, which speaks to the principal of parity. She properly articulated how she was to consider the principle of parity as follows:

> … 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. (Reasons for Sentence, 2021 YKTC 67, ("RFS") at para. 56)

[72] The sentencing judge added:

> 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. (RFS at para. 57)

[73] While the sentencing judge did not specifically mention and review in detail all the cases filed by the defence and the Crown in her reasons, which she did not have to, her decision reveals that she chose to address many of the cases relied upon by counsel for Mr. Jim in his submissions. In doing so, she drew appropriate analogies and distinctions. Additionally, she pointed out that some of the cases filed by the parties did not involve Indigenous offenders.

[74] The sentencing judge also noted that many of the cases filed by counsel pre-dated *Friesen*, which I also find was a proper consideration. She also remarked that, even if it were for a different sexual offence, the Court of Appeal of Manitoba had

increased a sentence significantly on appeal in light of the Supreme Court of Canada's directions in *Friesen* (*R v Alcorn*, 2021 MBCA 101).

[75] The sentencing judge's reasons reveal that she was alive to the clear message from the Supreme Court of Canada in *Friesen* regarding the need to impose sentences that reflect the inherent seriousness and wrongfulness of sexual offences committed against children. The Supreme Court of Canada warned that an upward departure from precedents and prior sentencing ranges may be required to reflect that the courts' understanding of the gravity and harmfulness of sexual offences against children has deepened; to give effect to the intent of Parliament in increasing maximum sentences for sexual offences against children since 2015; and to reflect society's contemporary understanding of the severity of the harm arising from those offences (*Friesen*, at paras. 106 -114). The sentencing judge properly reviewed the caselaw filed at sentencing in light of that decision.

[76] The fact that, despite the precedents filed by the defence, which found the mandatory minimum sentences in ss. 151(b) and 271(b) unconstitutional, the sentencing judge chose not to engage in a constitutional analysis, as she was entitled to, pursuant to *R v Lloyd*, 2016 SCC 13 ("*Lloyd*"), because she determined that an appropriate sentence for Mr. Jim was equal or higher (in the range of six to ten months) than the mandatory minimum sentence and that a conditional sentence was not appropriate in his case, does not automatically lead to the conclusion that she failed to properly consider defence's precedents and give proper weight to the parity principle.

[77] Considering the above, I fail to see how the judge misdirected herself with respect to the parity principle. I find the sentencing judge did not err in considering the

precedents provided to her and applying the parity principle in determining the sentence she imposed on Mr. Jim.

(b) Did the sentencing judge fail to give due weight to rehabilitation and *Gladue* principles?

[78] Section 718.2(e) of the *Code* provides that:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> ...
>
> (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.

[79] In *R v Gladue*, [1999] 1 SCR 688 ("*Gladue*"), the Supreme Court of Canada set out the methodology to apply when considering s. 718.2(e) in determining a fit sentence. This methodology was reaffirmed in *Ipeelee* at para. 72:

> … The methodology set out by this Court in *Gladue* is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed. *Gladue* directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

[80] Sentencing judges have a duty to apply s. 718.2(e) and *Gladue* principles in determining a fit sentence even in cases of serious offences (*Ipeelee* at paras. 84 and 85), including extremely serious cases of sexual violence against children (*Friesen* at para. 92). Failure to do so constitutes an error in principle. However, *Gladue* principles

do not mandate a particular result. What a judge must do is truly consider and give effect to *Gladue* principles in determining a fit sentence considering the particular circumstances of an Indigenous offender (*R v Wells*, 2000 SCC 10, at para. 44).

[81] As stated in *Ipeelee,* at para. 75:

> Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process. (my emphasis)

[82] The court provided further guidance at para. 83:

> … Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[83] The sentencing judge's reasons reveal her awareness and understanding of the Supreme Court of Canada's directions in *Gladue* and *Ipeelee* as well as her appreciation of the remedial aspect of s. 718.2(e).

[84] She took judicial notice of:

> … [T]he 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 (RFS at para. 22).

[85] She drew, from the *Gladue* report filed in this matter, the *Gladue* factors that specifically impact Mr. Jim's circumstances as an Indigenous offender. She noted that Mr. Jim's mother as well as his maternal aunts and uncles attended residential schools. She specifically recognized: "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." (RFS at para. 23)

[86] The sentencing judge remarked at para. 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] The sentencing judge also stated that one of the main considerations of the court is the "over-incarceration of Indigenous persons in our correctional facilities" (RFS at para. 91).

[88] In considering whether a conditional sentence was appropriate for Mr. Jim, she specifically stated that *Gladue* principles and the direction in *Ipeelee* and *Gladue* cannot

be ignored even in cases where denunciation and deterrence are of primary consideration. (RFS at paras. 96 and 97)

[89] The sentencing judges' reasons, when read in their entirety, reveal that she not only identified the systemic and specific *Gladue* factors impacting Mr. Jim's circumstances as an Indigenous offender, but incorporated them in her analysis and considered the *Gladue* principles in determining the appropriate sentence to impose on him.

[90] The sentencing judge noted the seriousness and wrongfulness of the offence of sexual assault against a child. She correctly identified that, pursuant to s. 718.01 of the *Code,* primary consideration must be given to denunciation and deterrence in sentencing for an offence involving the abuse of a person under the age of eighteen years. In addition, the sentencing judge properly identified that s. 718.04 of the *Code* applied in this matter as the victim is Indigenous and female (RFS at paras. 42-45). Section 718.04 also mandates that primary consideration be given to denunciation and deterrence.

[91] However, the sentencing judge also properly acknowledged, that while not a primary consideration, rehabilitation played a role in sentencing Mr. Jim. The court in *Friesen* at para. 104 makes this clear:

> Section 718.01 thus qualifies this Court's previous direction that it is for the sentencing judge to determine which sentencing objective or objectives are to be prioritized. Where Parliament has indicated which sentencing objectives are to receive priority in certain cases, the sentencing judge's discretion is thereby limited, such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority (*Rayo*, at paras. 103 and 107-8). However, while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing

> judge retains discretion to accord significant weight to other factors (including rehabilitation and *Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality (see *R. v. Bergeron*, 2013 QCCA 7, at para. 37 (CanLII)).

[92] In her reasons, the sentencing judge details the mitigating effect of Mr. Jim's guilty plea, expression of remorse, the *Gladue* factors, the fact he did not have a criminal record, he had steady employment and supported his young daughter from a previous relationship. (RFS at paras. 82-86 and 90)

[93] The sentencing judge noted Mr. Jim's abuse of alcohol was a significant contributing factor in the commission of the offence. She gave him credit for turning himself in to the police shortly after the events occurred, recognizing the seriousness of the offence, and recognizing he had a substance abuse problem. She also gave him credit for having made efforts to stop drinking and having been able to stop drinking for a significant period of time. She also recognized he had the support of his girlfriend and mother. (RFS at paras. 81, 82, 84 and 90)

[94] However, she stated that it was a matter of concern that Mr. Jim had started drinking regularly again, he had not taken any treatment and was residing in an environment where alcohol was present. She remarked that the PSR stated Mr. Jim was of average risk to reoffend. (RFS at paras. 78-82)

[95] The sentencing judge determined that a sentence in the range of six to 10 months was appropriate. Again, I note counsel for the appellant does not dispute that the length of the sentence impose on Mr. Jim was in the range. She submits a conditional sentence would have been the fit sentence to impose.

[96] The sentencing judge turned her mind to the imposition of a conditional sentence. She properly identified that a conditional sentence could only be imposed if she were satisfied that allowing Mr. Jim to serve his sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[97] She concluded she would not impose a conditional sentence in this matter even if it were available. She stated she was not satisfied that allowing Mr. Jim to serve his sentence in the community would not endanger the safety of the community. She expressed concerns with respect to Mr. Jim's path to rehabilitation and his risk of re-offending, considering he had not availed himself of the opportunity to attend treatment, which was available to him prior to sentencing (despite the lengthy period of time between the laying of the charges, the guilty plea and the sentencing hearing); he had started drinking again on a regular basis at the time of sentencing; and he was living in an environment where people consumed alcohol. (RFS at paras. 93-97)

[98] She also stated she was not satisfied that a conditional sentence would be consistent with the fundamental purpose and principles of sentencing in this case. (RFS at paras. 96 and 97)

[99] The sentencing judge's reasons reveal she considered and gave weight to the *Gladue* principles and the objective of rehabilitation in her assessment. She did not err in principle in giving them weight in her analysis but not primary consideration. Based on the evidence before her, the sentencing judge was not satisfied the prerequisites for a conditional sentence were met. The evidence supported the sentencing judge's conclusion. I see no reason to interfere with the exercise of her discretion.

(c) Did the sentencing judge fail to give due weight to the principle of proportionality?

[100] In her lengthy reasons for sentence, the judge weighed the principles and objectives of sentencing with the personal circumstances of Mr. Jim, and the circumstances of the offence, in determining a fit sentence for him. She properly took into consideration the mitigating and aggravating factors present in this case. The appellant has not demonstrated the sentencing judge committed an error in principle which impacted the sentence. Overall, I am of the view the sentencing judge did not err in considering the overarching principle of proportionality.

[101] Therefore, I find the sentencing judge did not commit an error in principle that impacted Mr. Jim's sentence. This ground of appeal is dismissed.

iii. Is the mandatory minimum sentence of six months' imprisonment in s. 271(b) of the *Code* when the victim is under the age of 16 years contrary to s. 12 of the *Charter*? If so, is the mandatory minimum sentence justifiable under s. 1 of the *Charter*?

[102] The mandatory minimum sentence for sexual assault when the Crown proceeds summarily under s. 271(b) is six months' imprisonment when the victim is under 16 years of age.

> 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.

Positions of the Parties

The Appellant

[103] Counsel for the appellant submits that the mandatory minimum sentence in s. 271(b) is grossly disproportionate and constitutes cruel and unusual punishment contrary to s. 12 of the *Charter* and is not saved by s. 1 of the *Charter*. Therefore, the appellant seeks a declaration that the mandatory minimum sentence in s. 271(b) is invalid and of no force and effect.

[104] Counsel for the appellant concedes that a court would be unlikely to hold that a six-month custodial sentence is grossly disproportionate in the appellant's case. However, counsel contends that the caselaw the appellant submitted refer to reasonable hypothetical situations where the mandatory minimum sentence would violate s. 12 of the *Charter*.

The Respondent

[105] Counsel for the respondent recognizes that some of the scenarios referred to in the cases filed by the appellant constitute reasonable hypotheticals for which the mandatory minimum sentence would be excessive. However, counsel for the respondent submits that a six-month custodial sentence for sexually assaulting a child does not offend s. 12 of the *Charter* because it is not grossly disproportionate. Counsel submits that the mandatory minimum sentence does not outrage standards of decency in any circumstances given the persistent and destructive problem of child sexual abuse in Canada. Counsel submits that Parliament's legislative amendments, which express its condemnation of sexual abuse of children, and the Supreme Court of Canada's recent decision in *Friesen*, which held that sexual offences against children require

significantly elevated sentences in order to reflect the grave harm these offences inflict on the victims and their families, support this conclusion.

Analysis

The s. 12 Analytical Framework

[106] As previously stated, the appellant does not contend that the six-month mandatory minimum sentence is grossly disproportionate when considered in light of the particular circumstances of his case. Rather, the issue before me is whether the mandatory minimum in s. 271(b) would constitute cruel and unusual punishment in any reasonably foreseeable factual scenario.

[107] In *R v Nur*, 2015 SCC 15, speaking for the majority, McLachlin C.J. (as she then was) summarized the process to follow when considering a *Charter* challenge to a mandatory minimum sentence:

> In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others. This is consistent with the settled jurisprudence on constitutional review and rules of constitutional interpretation, which seek to determine the potential reach of a law; is workable; and provides sufficient certainty. (*Nur* at para. 77)

[108] In *R v EO*, 2019 YKCA 9, at paras. 37 to 40 the Court of Appeal of Yukon held it is an appropriate use of judicial resources to consider the constitutionality of a mandatory minimum sentence even in cases where the offender before the court will be unaffected by the decision when the court engaging in that analysis has the ability to

declare the statutory provision at issue unconstitutional.

> [37] In *R. v. Lloyd*, 2016 SCC 13, the Court affirmed that a provincial court does not have the jurisdiction to strike down legislation as unconstitutional, but does have the power to find a law unconstitutional insofar as it affects the case before it (at para. 17). The Court also held that a provincial court does not have to engage in an analysis of the constitutionality of legislation if it would not affect the case, which is what the judge did here (at para. 18). Given the judge's conclusion on sentence, it cannot be said that he erred in concluding that he did not need to consider the issue of the mandatory minimum sentence.
>
> [38] However, that conclusion does not end the matter in this Court. When a court does have the ability to declare legislation unconstitutional, as long as the application is properly argued, it will not offend principles of judicial economy to engage in the analysis regardless of the effect on the individual before the court. Unlike a provincial court judge, a superior court of inherent jurisdiction or court with appropriate statutory authority can issue an order that invalidates the legislation. In *R. v. Ferguson*, 2008 SCC 6 at para. 73, and in *R. v. Nur*, 2015 SCC 15 at para. 51, the Court frowned on leaving unconstitutional provisions "on the books", as it violates the rule of law to allow unconstitutional laws to remain in force indefinitely and deprives the legislature of the important signal that a law does not pass constitutional muster. In short, it is an appropriate use of judicial resources to strike down unconstitutional mandatory minimum sentences even where the offender before the court will be unaffected by that ruling.

[109] As the issue was properly argued before me, I find it appropriate to consider the constitutionality of the mandatory minimum sentence in s. 271(b) of the *Code* in relation to reasonable hypothetical circumstances.

[110] However, I note that counsel for the appellant did not specifically argue the unconstitutionality of s. 742.1(b) of the *Code*, which provides that a conditional sentence cannot be imposed if the offence for which the offender is sentenced is punishable by a minimum term of imprisonment, even though a declaration of invalidity is sought for that

specific section in the amended Notice of Appeal filed by the appellant. As the matter was not argued before me, I will not consider the constitutionality of s. 742.1(b).

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

[112] The onus is on the appellant to establish, on a balance of probabilities, that the six-month mandatory minimum sentence violates s. 12 of the *Charter*.

[113] A sentence will not constitute "cruel and unusual" punishment simply because it is excessive or disproportionate to the appropriate punishment. It must be "grossly disproportionate" to the appropriate sentence taking into consideration the nature of the offence and the circumstances of the offender (*Lloyd* at para. 22). This is a high threshold. A grossly disproportionate treatment or punishment has been described as one that would "outrage standards of decency" (*Lloyd* at para 24).

[114] As stated by McLachlin C.J. (as she then was) for the majority in *Nur*, at para 39:

> This Court has set a high bar for what constitutes "cruel and unusual . . . punishment" under s. 12 of the *Charter*. A sentence attacked on this ground must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. Lamer J. (as he then was) explained at p. 1072 that the test of gross disproportionality "is aimed at punishments that are more than merely excessive". He added, "[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation". A prescribed sentence may be grossly disproportionate as applied to the offender before the court or because it would have a grossly disproportionate impact on others, rendering the law unconstitutional.

[115] Reasonable hypothetical scenarios or circumstances have been described as circumstances that "may reasonably be expected to arise" where the minimum

mandatory sentence would apply, based on facts that have arisen in existing caselaw or other common sense situations of minimum conduct that would be caught by the offence. Situations that are remote or far-fetched should not be considered.

> The inquiry into cases that the mandatory minimum provision may reasonably be expected to capture must be grounded in judicial experience and common sense. The judge may wish to start with cases that have actually arisen (I will address the usefulness of reported cases later), and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable. Fanciful or remote situations must be excluded: *Goltz*, at p. 506. To repeat, the exercise must be grounded in experience and common sense. Laws should not be set aside on the basis of mere speculation. (*Nur* at para. 62)
>
> …
>
> The reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are "remote" or "far-fetched" are excluded: *Goltz*, at p. 515. Contrary to what the Attorney General of Ontario suggests there is a difference between what is foreseeable although "unlikely to arise" and what is "remote [and] far-fetched": A.F. (Nur), at para. 66. Moreover, adoption of the likelihood standard would constitute a new and radically narrower approach to constitutional review of legislation than that consistently adhered to since Big M. The Court has never asked itself whether a projected application of an impugned law is common or "likely" in deciding whether a law violates a provision of the *Charter*. To set the threshold for constitutional review at common or likely instances would be to allow bad laws to stay on the books. (*Nur* at para. 68)

[116] With respect to the personal characteristics of the offenders in reasonably foreseeable scenarios, the court noted:

> Thus, the inquiry into reasonably foreseeable situations the law may capture may take into account personal

> characteristics relevant to people who may be caught by the mandatory minimum, but must avoid characteristics that would produce remote or far-fetched examples. (*Nur* at para. 76)

Sentencing for Sexual Offences Against Children Post-*Friesen*

[117] It is without question that Parliament has expressed its clear intent to increase penalties imposed on offenders who sexually assault, and, otherwise, exploit children. Parliament has legislated a number of changes to the penalty provisions in this area since 1987 by increasing maximum penalties for sexual offences against children. Parliament has also added s. 718.01 to the *Code*, which stipulates that for offences involving the abuse of a victim under 18 years of age, primary consideration is to be given to the objectives of denunciation and deterrence. (*Friesen* at paras. 95 to 105)

[118] In *Friesen*, the Supreme Court of Canada reiterated that:

> [42] Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the *Criminal Code*. Our society is committed to protecting children and ensuring their rights and interests are respected (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 67). As Otis J.A. stated in *R. v. L. (J.-J.)* (1998), 126 C.C.C. (3d) 235 (Que. C.A.), [translation] "the protection of children constitute[s] one of the essential and perennial values" of Canadian society (p. 250). Protecting children from becoming victims of sexual offences is thus vital in a free and democratic society (*R. v. Mills*, 2019 SCC 22, at para. 23).

[119] As earlier mentioned, the Supreme Court of Canada also provided guidance regarding sentencing in cases of sexual abuse of children. The Court sent a clear message that sentences for sexual offences against children must increase:

> … [W]e send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families,

> and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large (*Friesen* at para. 5).

[120] Accordingly, “imposing proportionate sentences that respond to the gravity of sexual offences against children and the degree of responsibility of offenders will frequently require substantial sentences” (*Friesen* at para. 114).

[121] The Court also provided specific guidance on the following significant factors in determining a fit sentence in cases involving sexual offences against children “to promote the uniform application of the law of sentencing”: likelihood to reoffend, abuse of a position of trust or authority, duration and frequency, age of the victim, degree of physical interference, and victim participation. (*Friesen* at paras. 121-154) The principles outlined by the Court with respect to those factors also inform the analysis regarding the constitutional validity of mandatory minimum sentences provided by Parliament for sexual offences against children.

[122] However, the Court also cautioned that its comments regarding the wrongfulness and gravity of sexual offences against children and the seriousness of the harm inflicted to a child victim do not constitute a direction to ignore the overarching principle of proportionality and relevant factors that may reduce an offender’s moral culpability. The Court recognized that the offence of sexual assault covers a wide-range of conduct and that the personal circumstances of an offender, such as mental disabilities, may have a

mitigating effect. The Court also recognized that *Gladue factors*, which may have a mitigating impact on an accused's moral blameworthiness must be considered.

> [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).
>
> [92] Likewise, where the person before the court is Indigenous, courts must apply the principles from *R. v. Gladue*, [1999] 1 S.C.R. 688, and *Ipeelee*. The sentencing judge must apply these principles even in extremely grave cases of sexual violence against children (see *Ipeelee*, at paras. 84-86). The systemic and background factors that have played a role in bringing the Indigenous person before the court may have a mitigating effect on moral blameworthiness (para. 73). Similarly, a different or alternative sanction might be more effective in achieving sentencing objectives in a particular Indigenous community (*Friesen* at para. 74).

[123] In addition, as previously mentioned, while denunciation and deterrence must be given primary consideration in sentencings for sexual offences against children, other objectives, such as rehabilitation and *Gladue* factors, may be given significant weight when appropriate.

> Section 718.01 thus qualifies this Court's previous direction that it is for the sentencing judge to determine which sentencing objective or objectives are to be prioritized. Where Parliament has indicated which sentencing objectives are to receive priority in certain cases, the sentencing

> judge's discretion is thereby limited, such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority (*Rayo*, at paras. 103 and 107-8). However, while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and *Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality (see *R. v. Bergeron*, 2013 QCCA 7, at para. 37 (CanLII)). (*Friesen* at para. 104)

Reasonably Foreseeable Scenarios

[124] The appellant has pointed to a number of reasonable hypothetical scenarios stemming from the caselaw to support the submission that a six-month mandatory minimum sentence would be grossly disproportionate to the appropriate sentence. More specifically, the appellant has referred to the reasonable hypotheticals considered in a few cases where courts determined that the 90-day mandatory minimum sentence in s. 151(b) violates s. 12 of the *Charter*. The appellant also referred to the actual facts of *R v Gargan*, 2021 NWTTC 9 ("*Gargan*"). I intend to pay particular attention to some of the post-*Friesen* cases referenced by counsel for the appellant.

[125] First, I am of the view that the reasonable hypotheticals considered in some of the cases filed by the appellant with respect to the constitutional validity of the mandatory minimum sentence for sexual interference in s. 151(b) are useful because the conduct at issue would also be caught by the offence of sexual assault under s. 271(b). In *Friesen*, the Supreme Court of Canada recognized the elements of the offence of sexual assault and sexual interference are similar. (*Friesen* at para. 44) - I note Mr. Jim was charged with both s. 151(b) and s. 271(b) for the conduct that led to his guilty plea to the offence of sexual assault. In addition, the Court made it clear that

sexual interference with a child should not be treated as less serious than sexual assault of a child:

> [120] It is an error of law to treat sexual interference as less serious than sexual assault. As stated above, Parliament has established the same maximum sentences for both sexual interference and sexual assault of a person under the age of 16. The elements of the offence are also similar, and a conviction for sexual assault of a child and for sexual interference with a child can frequently be supported on the same factual foundation (*R. v. M. (S.J.)*, 2009 ONCA 244, 247 O.A.C. 178, at para. 8).

[126] *R v. C.B.A.* 2021 BCSC 2107 ("*C.B.A.*"), is a post-*Friesen* summary conviction appeal decision involving the constitutionality of the 90-day mandatory minimum sentence in s. 151(b) for the offence of sexual interference. The court considered a number of hypotheticals in which the offender's moral culpability is reduced due to intellectual disabilities or where significant *Gladue* factors must be considered. The court concluded, in finding the mandatory minimum offended s. 12 of the *Charter* and was not saved by s. 1: that "[i]t is not difficult to imagine circumstances in which the imposition of a 90-day sentence on an offender who had engaged in an isolated caress of a victim's thigh or buttocks would be grossly disproportionate" (para. 52). I understand that in that case the court used the term caress, which the Supreme Court of Canada directed to avoid because it conveys a message that appears to minimize the violent nature of the act. However, I am of the view that the isolated or brief touching over clothing for a sexual purpose referred to in *C.B.A.* is not a far-fetched example. In addition, that specific conduct would be caught by the offence of sexual assault.

[127] In *Gargan*, also a post-*Friesen* decision, the 18-year-old accused had attended a community event with the young adolescent victim, who was 13 years old at the time.

He reached out to hug her, and touched her buttocks. Both the accused and the victim were Indigenous. The accused entered an early guilty plea to the offence of sexual interference pursuant to s. 151(b). As the Crown had proceeded summarily, the 90-day mandatory minimum sentence applied. The defence challenged the constitutional validity of the mandatory minimum sentence. The sentencing judge concluded this was a brief and isolated contact, which had limited impact on the victim. The accused was remorseful. At the time of the offence, he did not have a criminal record. *Gladue* factors were present. The sentencing judge also found the accused's risk to reoffend was low as he was continuing to take active steps to address his addiction and trauma. The sentencing judge found that a proportionate sentence for Mr. Gargan would range between a suspended sentence with a period of probation to a short period of custody, including a conditional sentence. She found imposing a minimum sentence of 90 days in custody would be grossly disproportionate considering the circumstances of the offence and of the offender. She held the mandatory minimum sentence infringed s. 12 of the *Charter* and was not saved by s. 1. She sentenced the offender to a term of imprisonment of one day deemed served by his attendance in court, followed by a period of probation of 12 months.

[128] Again, the actual conduct at issue in *Gargan* would be caught by the offence of sexual assault. In addition, the personal circumstances of Mr. Gargan are certainly not unfamiliar to courts in the Yukon. In any event, as this situation occurred in the caselaw, and considering the comments I made earlier regarding the similarities between the offence of sexual interference and sexual assault against a child, I am of the view it

automatically constitutes a reasonable hypothetical that I can consider, even though it involves an accused pleading guilty to sexual interference instead of sexual assault.

[129] As I stated earlier, the Supreme Court of Canada, in *Friesen,* clearly recognized the intrinsic wrongfulness and harmfulness of sexual offences against children. The court also sent a clear message that sentences for sexual offences against children must increase. However, the Supreme Court of Canada did not direct judges to disregard circumstances that may have a mitigating effect on the moral blameworthiness of an offender and important principles and objectives of sentencing other than denunciation and deterrence, which must be given primary consideration. Taking into consideration the principles enunciated in *Friesen*, I am of the view that imposing a sentence of six months in jail on a young, first time, adult offender, at low risk to reoffend, with mitigating and *Gladue* factors, when the circumstances of the offence "are not too egregious", such as the ones in *Gargan*, is fundamentally unfair and as a result, grossly disproportionate. I am of the view that sentencing such an offender to six months in prison would "outrage standards of decency".

[130] I have also reviewed the fact situation and personal circumstances of the 18-year-old offender in *R v Kapolak*, 2020 NWTTC 12, another post-*Friesen* decision, as well as the other sentencing decisions mentioned in that case. Mr. Kapolak pleaded guilty to sexual assault. As in the case at bar, the Crown had proceeded summarily, resulting in a mandatory minimum sentence of six months' imprisonment. The offender, who did not have a criminal record, sexually assaulted a 15-year-old victim when he approached her on the street in broad daylight, engaged her in casual conversation, grabbed her towards him, and touched her buttocks, breasts, and vagina over her

clothing. He grabbed her by the hips and attempted to hump her buttocks, and then tried to place his fingers between her legs. As the victim attempted to run away, he grabbed her arm and pulled her back, ultimately touching her breast and vaginal area. The assault lasted about eight minutes before the victim was able to run away. The accused was of very small height and build, and his appearance was childlike.

[131] The court acknowledged the seriousness of the offence. Based on expert evidence presented at sentencing, the court also found that the personal circumstances of the offender who suffered from a moderate intellectual disability, and from an alcohol-related neuro-developmental disorder (FASD), reduced his moral blameworthiness. The intellectual disability resulted in impulsive actions, and the offender struggled with the cause and effect of such actions.

[132] The court ultimately found that a conditional sentence would be a fit and proportionate sentence in that case:

> For an offender with challenges to his executive functions, repetition of instructions, structure, and professional follow-up, appear to be key. A carefully crafted conditional sentence order can bring the necessary restrictions to a person's freedom while providing these rehabilitative tools, and thus achieve deterrence. A short sentence of imprisonment, which could be served intermittently, would also achieve this objective. As the Alberta Court of Queen's Bench wrote in the matter of *R. v. Esposito*, "while a jail term is most commonly associated with a sentence that emphasizes deterrence and denunciation, it is important to recall that the Supreme Court in *Proulx,* [2000] 1 S.C.R. 61, concluded that a conditional sentence is "also a punitive sanction capable of achieving the objectives of denunciation and deterrence.": at para. 22". I find that a conditional sentence order would be a fit and proportionate sanction. (para. 29)

[133] The court concluded the mandatory minimum sentence was grossly disproportionate to the appropriate sentence and resulted in a breach of s. 12 of the *Charter*. While the actions of the offender in *Kapolak* are more egregious than a brief sexual touching, it is a good example of how an offender's proven intellectual disability, neuro-developmental disorder and\or *Gladue* factors may affect their moral blameworthiness and render a mandatory minimum sentence of six months' imprisonment grossly disproportionate.

[134] I have considered the cases submitted by counsel for the respondent in support of the position that while the six-month mandatory minimum sentence may, in some cases, result in a harsh or disproportionate sentence, it does not reach a level where it is "so excessive as to outrage standards of decency", or be "abhorrent or intolerable" (*Lloyd* at para. 24) to society, which is required to infringe s. 12 of the *Charter*.

[135] In *R v Ditoro*, 2021, ONCJ 540 ("*Ditoro*"), the court considered and upheld the constitutional validity of the six-month mandatory minimum sentence for child luring. In my view, *Ditoro* is distinguishable because it deals with the offence of child luring, which is a different offence involving different constitutive elements that are not present for the offence of sexual assault.

[136] *In R v Bear*, 2020 SKQB140*,* the Court of Queen's Bench for Saskatchewan, sitting as a summary conviction appeal court, found the sentencing judge had committed an error in principle that impacted the sentence in determining that a conditional sentence in the range of 18 months was a proportionate sentence and, consequently, found that the six-month mandatory minimum sentence in s. 271(b) was grossly disproportionate and violated s. 12 of the *Charter*. The Court of Queen's Bench

found that, because in its view the lowest proportionate sentence for Mr. Bear was five months in custody, the six-month mandatory minimum sentence in s. 271(b) was not grossly disproportionate. In that case, the 35-year-old bisexual Indigenous accused was found guilty of sexual assault against a 14-year-old vulnerable transgender Indigenous victim after trial. The sexual assault consisted of two separate incidents where the accused put his hand on the victim's thigh and kissed the victim, forcefully putting his tongue in the victim's mouth, while they were alone in the accused's car. The summary conviction appeal court noted the accused had a prior conviction for sexual assault and stood in a position of trust to the child victim. The court allowed the Crown's sentence appeal but adjourned sentencing for further submissions on a fit sentence to impose.

[137] The Court of Queen's Bench declined to entertain reasonable hypotheticals because they had not been appropriately considered by the sentencing judge. As a result, I find it to be of little assistance to the reasonable hypothetical analysis to be conducted in this case.

[138] In *R v S.A.,* 2016 ONSC 5355 (sexual interference) and *R v Aldersley*, 2018 BCSC 734 (sexual exploitation), the courts upheld the constitutional validity of the mandatory minimum sentence of 45 days in place at the time for those offences. As the inquiry related to a much lower mandatory minimum sentence than the mandatory minimum sentence of six months of imprisonment in s. 271(b), I do not find these decisions persuasive.

[139] In *Lloyd* the Supreme Court of Canada recognized that since mandatory minimum sentences apply to offences that can be committed in a broad array of

circumstances by a wide range of people, they are vulnerable to constitutional challenge. The court stated at para. 35:

> … This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.

[140] The offence of sexual assault encompasses a broad range of conduct. While the Supreme Court of Canada in *Friesen* recognized that any type of sexual violence against children is very serious and can have a devastating effect on the child victim; the court also recognized that personal circumstances of an offender (such as mental disabilities and *Gladue* factors) may have a mitigating effect on their moral blameworthiness; and that certain situations are more egregious than others considering aggravating factors, such as the duration and frequency of the sexual violence.

[141] Considering, in particular, the reasonable hypothetical discussed in *C.B.A*., which I referred to earlier in my decision, and the actual circumstances in *Gargan*, I am of the view that the mandatory minimum sentence of six months' imprisonment for sexual assault when the victim is under 16 years of age could result in reasonably foreseeable circumstances where that penalty is grossly disproportionate. Therefore, I find it breaches s. 12 of the *Charter*.

[142] The Crown has conceded that if I were to find a breach of s. 12, it is not saved by s. 1 of the *Charter*.

[143] In the result, I declare the six-month mandatory minimum sentence in s. 271(b) to be invalid and of no force and effect.

iv. Should the Court stay the execution of the custodial portion of Mr. Jim's sentence?

[144] Counsel for the appellant submits that, if Mr. Jim's appeal is dismissed and his sentence upheld, I should grant a stay of execution of the remaining custodial portion of his sentence. Counsel for Mr. Jim submits it would be unfair and not in anyone's interests to re-incarcerate Mr. Jim, a young Indigenous first-time offender who will continue to be gainfully employed after he completes a residential addiction treatment program.

[145] Counsel for the respondent opposes the granting of a stay.

[146] There is no dispute that this Court, as a summary conviction appeal court, has jurisdiction to grant a stay of execution of sentence. The caselaw filed by the parties reveals that a stay of execution of sentence may be granted to an offender who has already served their original sentence, either in part or in full, and whose sentence is increased on appeal, if the appeal court finds it is in the interests of justice to do so. This assessment is done on a case-by-case basis (*R v Noseworthy*, 2021 NLCA 2 ("*Noseworthy*") at paras. 132 and 148).

[147] The following factors, while not exhaustive, have been considered in determining whether a stay is in the interests of justice:

(i) whether the offender has served their sentence, either entirely or in part;

(ii) the passage of time since the offender was released;

(iii) whether the offender has complied with their release conditions, if any, and has lived a law-abiding lifestyle since their conviction;

(iv) difference in the sentence imposed and that imposed following appeal;

(v) rehabilitative efforts and the impact on the offender's rehabilitation if re-incarceration were to be imposed; and

(vi) the seriousness of the offence and whether any measures other than re-incarceration could be imposed that would serve to denounce and deter while still promoting rehabilitation; (see *Noseworthy* at paras. 135-138; *R v Veysey*, 2006 NBCA 55 at para. 32; *R v Smickle*, 2014 ONCA 49 at paras. 11, 12, 15 and 18- 21; and *R v Best*, 2012 NSCA 34 at paras. 33 to 39).

[148] With respect to the stay issue, the evidence regarding Mr. Jim's attendance at a residential treatment program pending appeal is therefore relevant and admissible.

[149] Overall, I do not find Mr. Jim's circumstances warrant a stay of execution of sentence. Mr. Jim's original sentence was imposed approximately eight months ago. He was released on bail pending appeal shortly after being sentenced. As a result, Mr. Jim only served a very small portion of his original sentence. Mr. Jim's original sentence was upheld and not increased on appeal. While Mr. Jim has taken the opportunity to commence a residential treatment program in early May, while on bail pending appeal, to address his underlying issues, which he should be commended for, I do not find his re-incarceration would jeopardize his rehabilitative therapeutic efforts that started recently. I note that both parties agreed that Mr. Jim be given the opportunity to complete his residential treatment program before I issued my decision. By this time, his residential treatment program should be complete. In addition, while Mr. Jim may not be in a position to provide financial support for his young child while incarcerated, there is no evidence before me that Mr. Jim will lose his employment if he is re-incarcerated to

serve his sentence. The offence to which Mr. Jim pleaded guilty is serious. I do not find the interests of justice would be served by any measure other than re-incarceration.

[150] Mr. Jim will therefore have to serve the remaining portion of the sentence imposed upon him by the sentencing judge.

Conclusion

[151] The appeal of Mr. Jim with respect to his sentence is dismissed and his sentence of seven months of imprisonment followed by probation for a period of two years is upheld. A stay of execution of the remaining custodial portion of his sentence is denied.

[152] Based on reasonably foreseeable scenarios, I find the mandatory minimum sentence of six months' imprisonment in s. 271(b), when the victim is under sixteen years of age, constitutes cruel and unusual punishment contrary to s. 12 of the *Charter*. It is not saved by s. 1 of the *Charter*. Therefore, the mandatory minimum sentence of six months' imprisonment in s. 271(b) of the *Code* is invalid and of no force and effect.

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CAMPBELL J.