COURT OF APPEAL OF YUKON

Citation: *R. v. D.A.D.*,
2024 YKCA 9

Date: 20240812
Dockets: 22-YU895; 22-YU896

Docket: 22-YU895

Between:

Rex

Appellant

And

D.A.D.

Respondent

– and –

Docket: 22-YU896

Between:

Rex

Appellant

And

G.K.

Respondent

Restriction on publication: Publication bans have been mandatorily imposed in both matters under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting, or transmission in any way of evidence that could identify the complainants, identified in this judgment as K.B. and J.B. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Cooper
The Honourable Madam Justice Fenlon

On appeal from: Orders of the Supreme Court of Yukon, dated November 25, 2022 (*R. v. D.A.D.*, 2022 YKSC 62, Whitehorse Docket 21-AP004); and (*R. v. G.K.*, 2022 YKSC 61, Whitehorse Docket 21-AP003).

Counsel for the Appellant, appearing via videoconference:	T. Lemon I. Glasner
Counsel for the Respondents:	K. Eldred
Place and Date of Hearing:	Whitehorse, Yukon May 14, 2024
Place and Date of Judgment:	Whitehorse, Yukon August 12, 2024

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Cooper

Summary:

The summary conviction appeal judge struck down the 90-day mandatory minimum sentences for the summary conviction offences of sexual interference and sexual exploitation, holding they violated s. 12 of the Charter. The Crown appealed.

Held: Appeals dismissed. The judge did not rely on unreasonable hypotheticals. She did not overstate the scope and reach of the offences, which encompass a wide spectrum of conduct. Nor did she fail to consider the effects of the penalties on the hypothetical offenders or the legislature's objectives. Although the judge did not expressly address some components of the gross disproportionality analysis identified in Hills, it is evident from her reasons and the live issues before her that she did consider them.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] Before the Court are two appeals which raise a common issue: whether a 90-day mandatory minimum sentence for the summary conviction offences of sexual interference and sexual exploitation constitutes cruel and unusual punishment in breach of s. 12 of the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982,* being schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

Background

Sexual Exploitation: R. v. G.K.

[2] G.K. was the director of a village recreation centre in a small community located approximately two hours from Whitehorse. In the summer of 2018, he hired K.B. as a youth program coordinator; he was her supervisor. G.K. was 59 years old and K.B. was 17.

[3] On August 8, 2018, G.K. encountered K.B. in the kitchen of the recreation centre. When G.K. asked about her day, K.B. told him she had recently broken up with her boyfriend. In response G.K. questioned her about her sex life. She did not know what to say except that it was "okay". G.K. then approached her from behind, rubbing her stomach with his hand and kissing her neck twice, before leaving. K.B. became upset and went outside to have a cigarette. Soon after, G.K. joined her and suggested he had gotten her "all hot and bothered." The conversation changed

when a mother and child approached. The two returned to the recreation centre but went to different locations.

[4] K.B. did not feel right about what had happened and went to G.K.'s office to tell him she would like the rest of the day off. G.K. asked K.B. to talk with him upstairs, where they went to a storage room. G.K. closed the door and told K.B. to let him know if she wanted to have sex. He said not to tell anyone, including his wife. K.B. did not know how to respond and said that she would think about it. He hugged K.B. and kissed her on the neck twice. She left the building shortly afterwards.

[5] G.K. was charged with sexual exploitation contrary to s. 153(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*] which provides:

> **Sexual exploitation**
>
> **153 (1)** Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who
>
> > **(a)** for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; …

Section 153(2) defines a "young person" as "a person 16 years of age or more but under the age of eighteen years".

[6] The Crown proceeded summarily under s. 153(1.1)(b), which provides:

> **Punishment**
>
> **(1.1)** Every person who commits an offence under subsection (1)
>
> > …
> >
> > **(b)** is guilty of an offence punishable on summary conviction and is liable 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 90 days.

[7] G.K. was convicted after trial. His marriage ended, and he lost his job and his standing in the community.

[8] K.B. suffered harm as a result of the offence. In a victim impact statement, she described the negative reaction towards her by some community members

because of her choice to proceed with her complaint. She said she felt “degraded” by comments made to her. In a poem included in her victim impact statement, she also expressed that G.K. took away her innocence.

[9] On sentencing in Territorial Court, G.K. challenged the mandatory minimum sentence of a 90-day jail term. He contended the mandatory minimum violated s. 12 of the *Charter* which guarantees that “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment”. G.K. conceded that the mandatory minimum penalty would not be a grossly disproportionate punishment for him, given the circumstances of the offence. He relied instead on three hypothetical scenarios.

[10] The sentencing judge concluded that 90 days in jail would be a grossly disproportionate punishment for the hypothetical offenders described in the scenarios. Having determined the mandatory minimum was invalid, he imposed a six-month conditional sentence followed by two years of probation, and ancillary orders.

[11] The Crown appealed to the Supreme Court of Yukon, challenging the sentencing judge’s declaration that the mandatory minimum provision was invalid and asking for the imposition of a 90-day sentence of imprisonment.

[12] The summary conviction appeal judge agreed that a conditional sentence was not appropriate for G.K., imposing instead a 90-day term of imprisonment, which she deemed served. She concluded that the sentencing judge had failed to give effect to the principle that sexual offences involving children should generally not result in conditional sentence orders.

[13] Addressing the constitutionality of the mandatory minimum sentence, the appeal judge agreed with the sentencing judge that, although the mandatory minimum was not grossly disproportionate for G.K., there were reasonable hypotheticals in which applying the mandatory minimum would result in a grossly disproportionate sentence: at paras. 40–41. She therefore struck down that provision of the *Code*.

Sexual Interference: R. v. D.A.D.

[14] In the summer of 2019, J.B. was working as a summer student while staying at a family member's residence located at one side of a duplex. Her cousin, D.A.D., lived in the other half of the duplex with his common-law partner and their children. D.A.D. was 28 years old and J.B. was 15 years old.

[15] One evening when D.A.D.'s common-law partner and children were out of the house, he invited J.B. to come over and asked if she wanted to spend the night. After receiving permission from her aunt to do so, J.B. went to D.A.D.'s house where they watched a movie on the couch and engaged in "cuddling". D.A.D. fell asleep but later woke up and placed his hand on J.B.'s vaginal area over her shorts. She pretended to be asleep. D.A.D. stopped when J.B. rolled over.

[16] D.A.D. was charged with sexual interference contrary to s. 151(b) of the *Code* which provides:

> **Sexual interference**
>
> **151** Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> …
>
> **(b)** is guilty of an offence punishable on summary conviction and is liable 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 90 days.

[17] D.A.D. pleaded guilty to sexual interference shortly after the trial commenced. He is Indigenous, did not have a criminal record, and had been employed full-time as a youth worker with the Yukon First Nation. D.A.D. resigned from that position shortly after his arrest. He withdrew from his community due to feelings of shame and stigmatization given the nature of the charges. His relationship with his common-law partner deteriorated and they eventually separated. D.A.D. expressed remorse and willingness to take partial responsibility, admitting to sexual activity but stating that the "incident was consensual as opposed to sexual assault".

[18] J.B. suffered significant harm from the sexual interference. In a victim impact statement, she described blaming herself for the offence because it would not have happened if she had not gone to stay the night. She began drinking alcohol every day, putting herself in vulnerable and dangerous situations. She also engaged in cutting and burning herself, eventually seeking treatment and counselling and attending rehabilitation. J.B. described feelings of profound estrangement from family members, some of whom blamed her for the offence.

[19] On sentencing in Territorial Court, D.A.D. challenged the constitutionality of the mandatory minimum provision and requested a nine-month conditional sentence order. The judge determined the 90-day mandatory minimum jail sentence prescribed by s. 151(b) was not grossly disproportionate for D.A.D. The Crown sought four months' incarceration, which the sentencing judge found to be within the appropriate range.

[20] Ultimately, however, the sentencing judge held that the 90-day mandatory minimum sentence for summary sexual interference violated s. 12 of the *Charter.* He imposed a six-month conditional sentence order followed by 15 months' probation, and ancillary orders. In doing so, the judge did not conduct his own gross disproportionality analysis, relying instead on *R. v. Pye*, 2019 YKTC 21, which found the mandatory minimum to be unconstitutional based on hypotheticals presented in that case.

[21] The Crown appealed both the sentencing judge's finding that the mandatory minimum provision was unconstitutional and the imposition of a six-month conditional sentence order, asking the court to impose a 90-day carceral sentence. The same summary conviction appeal judge who heard the Crown's appeal from the Territorial Court in G.K.'s case also heard the Crown's appeal in relation to D.A.D.

[22] The appeal judge agreed that a conditional sentence was not appropriate for D.A.D. and substituted a 90-day term of imprisonment, deemed served. She concluded that the sentencing judge failed to give effect to the harm inflicted on J.B. by the offence, as required by *R. v. Friesen*, 2020 SCC 9, noting that "while the

degree of the physical interference was low and the physical contact was not sustained, the effect of the assault on J.B. was profound": at para. 24.

[23] Addressing the constitutionality of the mandatory minimum, the judge concluded there were reasonable hypotheticals in which applying the mandatory minimum would result in a grossly disproportionate sentence: at para. 32. She accordingly struck down that provision of the *Code.*

Issues on Appeal

[24] The Crown argues that a 90-day jail sentence cannot be grossly disproportionate for the two sexual offences in issue because both require the offender to have a specific intent to touch a child for a sexual purpose, involve high moral culpability, and cause significant harm to victims. The Crown identifies the following errors in the appeal judge's reasoning in relation to both appeals, contending she:

(a) Relied on unreasonable hypotheticals;

(b) Overstated the scope and reach of the offences;

(c) Failed to consider the effects of the penalties on the hypothetical offenders; and

(d) Failed to give adequate weight to the penalties and their objectives.

[25] Before turning to the specific grounds of appeal, it is necessary to review the applicable framework and principles.

The Analytical Framework for Assessing Gross Disproportionality

[26] Assessing whether a mandatory minimum sentence violates s. 12 of the *Charter* requires the court to conduct a two-stage inquiry:

1. Determine what constitutes a fit and proportionate sentence having regard to the objectives and principles of sentencing in the *Code*.

2. Consider whether the impugned provision requires imposition of a sentence that is grossly disproportionate to the fit and proportionate sentence.

The assessment may proceed on the basis of either the actual offender before the Court or another hypothetical offender in a reasonably foreseeable case: *R. v. Bissonnette*, 2022 SCC 23 at para. 63; *R. v. Nur*, 2015 SCC 15 at para. 77.

[27] In *R. v. Hills*, 2023 SCC 2, and the companion case *R. v. Hilbach*, 2023 SCC 3, the Supreme Court of Canada identified three specific components to be considered at the second stage of the analysis. The components are intended to simplify and focus this part of the assessment: *Hills* at para. 122. They are:

1. The scope and reach of the offence (since mandatory minimum sentences for wide-ranging offences are more vulnerable to challenge);

2. The effects of the penalty on the offender; and

3. The penalty, including the balance struck by its objectives (i.e., does it exceed what is necessary to achieve those objectives and does it exclude any aims of sentencing, such as rehabilitation).

[28] Justice Côté writing in dissent, and Professor Quigley in a commentary on *Hills*, note that these components overlap to some extent with the considerations engaged in determining a fit sentence at stage one of the analysis: *Hills* at paras. 178–182, Côté J, dissenting; Tim Quigley, Criminal Reports – Comment on *R. v. Hills*, 85 C.R. (7th) 225 at 227. However, as Justice Martin observed in *Hills*, the components are intended to provide guidance and inform and focus the gross disproportionality assessment—"courts need not adhere to a rigid test or fixed set of factors": at para. 147. Ultimately, assessing whether the difference between a fit sentence for a particular offender and the mandatory minimum sentence is so grossly disproportionate that it violates human dignity and constitutes cruel and unusual punishment is a normative exercise: *Hills* at paras. 47–48.

[29] Courts must respect the right of Parliament to "provide for a compulsory term of imprisonment upon conviction for certain offences": *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045 at 1077, 1987 CanLII 64 (S.C.C.). A sentence imposed by Parliament may be unfit, excessive and disproportionate; it will only cross the constitutional line when it becomes grossly disproportionate: *Hills* at para. 47. Gross disproportionality is a constitutional standard that has been expressed as "so excessive as to outrage standards of decency", or "'shock the conscience' of Canadians"; and "'abhorrent or intolerable' to society"; it is a high bar: *Hills* at para. 109.

[30] With these general principles and the framework squarely before us, I turn now to the particular issues raised by the Crown on these appeals.

1. Did the appeal judge rely on unreasonable hypotheticals?

(a) Sexual Exploitation: R. v. G.K.

[31] In addressing G.K.'s constitutional challenge, the appeal judge relied on the following hypothetical. A 23-year-old student teacher who has a university degree in mathematics is doing a practicum at the victim's school. She agrees to tutor the 17-year-old victim, who is not in her class. The teacher suffers from a serious mental health issue, and while in mental distress, kisses the student on the lips. The teacher pleads guilty, is remorseful, and at low risk to reoffend. Imprisonment would have a negative impact on treatment she is undergoing. The victim impact statement indicates that the student has overcome the incident.

[32] While acknowledging that the purpose of a hypothetical is to test the lower end of the spectrum of conduct captured by the offence (*Hills* at para. 160), the Crown submits this scenario is not a reasonable one. First, it fails to establish the essential element of a perpetrator who is in a position of trust in relation to the victim. Second, the hypothetical victim is said to experience no harm, which is contrary to *Friesen*'s directive that harm is inherent in the sexual exploitation of children.

[33] I would not accede to this submission. The hypothetical relied on by the appeal judge is very similar to the scenario used by the Nova Scotia Court of Appeal in *R. v. Hood*, 2018 NSCA 18:

> The offender was a first year teacher in her 20s with bipolar disorder; the offender texted a 17-year-old student about a school assignment; they met and the offender sexually touched the student; the offender was experiencing a manic episode at the time; and this is the only sexual contact between the offender and the victim.

The Nova Scotia Court of Appeal crafted this hypothetical (with minor variations) to capture the offences of sexual exploitation, sexual interference, and child luring, all of which had one-year mandatory minimum sentences where the Crown proceeded by indictment: *Hood* at paras. 143–148, 151.

[34] The Supreme Court of Canada endorsed this hypothetical as reasonable, not far-fetched, and within the scope of the offence of luring in *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 118. Courts of Appeal in British Columbia, Manitoba and Ontario have also endorsed the *Hood* hypothetical: *R. v. JED*, 2018 MBCA 123; *R. v. Scofield*, 2019 BCCA 3*; R. v. B.J.T.*, 2019 ONCA 694.

[35] Finally, I note that this Court adopted the *Hood* hypothetical in *R. v. E.O.*, 2019 YKCA 9, a case in which the offender challenged the mandatory minimum of one year's imprisonment for sexual exploitation where the Crown proceeds by indictment. Justice Bennett, writing for the Court, held that the hypothetical was "reasonable and not far-fetched": at para. 53.

[36] I cannot agree with the Crown that the hypothetical relied on by the appeal judge in the present case is materially different from the *Hood* hypothetical because the offender is a tutor, rather than a teacher. The Crown argues that the scenario fails to establish the requisite element of a trust relationship. However, trust relationships occur on a spectrum: *Friesen* at para. 125. A tutor/student relationship simply falls at the lower end of that spectrum: *R. v. Aird*, 2013 ONCA 447.

[37] Nor do I agree with the Crown's contention that the hypothetical is flawed because it denies the inevitable harm experienced by child victims of sexual offences. The Supreme Court of Canada in *Friesen* recognized that the likelihood potential harms will materialize "of course varies depending on the circumstances of each case": at para. 79. *Friesen* also recognized that child victims of sexual offences may overcome these challenges: at para. 59. The hypothetical in issue does not deny all harm; it merely states that the victim has overcome it.

(b) Sexual Interference: R. v. D.A.D.

[38] In the second appeal, the judge relied on a hypothetical scenario in which a young adult with intellectual disabilities, significant *Gladue* factors, or both, touches the victim once on the thigh or buttocks, and the victim states they have suffered minimal or no harm. Again, the Crown contends this is an unreasonable scenario because it denies the harm inherent in sexual touching of children, and does not establish a necessary element of the offence since it is not clear that the touching was for a sexual purpose.

[39] In my view the judge did not err in concluding that the hypothetical proposed by D.A.D. was a reasonable one. I have already addressed the first objection and will not repeat that analysis here. As for the argument that a brief, single, and isolated act of touching may not be sufficient to prove intent to touch for a sexual purpose, I need only turn to *R. v. Gargan*, 2023 NWTCA 5, the case upon which the hypothetical is based.

[40] In that case, the 23-year-old offender who had been consuming alcohol approached the 13-year-old victim at a community event. He reached out to hug the victim, touching her on the buttocks for a sexual purpose. The offence was "brief and isolated". Both the offender and the victim were Indigenous. There was no information before the court about the effect of the touching on the victim. The offender pleaded guilty to sexual interference, had no criminal record, suffered from the systemic disadvantage of Indigenous people, was remorseful, had taken steps to

get treatment for his alcohol addiction, and had reintegrated into the community: *Gargan* at paras. 3–4.

[41] I turn now to the Crown's submission that the appeal judge failed to fix a hypothetical sentence for the offender in this scenario, as required at the first stage of the gross disproportionality framework. The Crown contends this Court should complete that step and find that a fit sentence for the hypothetical offender would be a 30 to 90-day jail sentence—a penalty that cannot be described as grossly disproportionate to the mandatory minimum.

[42] Respectfully, I cannot agree with either submission. As the respondent points out, the appropriate sentence for the hypothetical offender is implicit in the appeal judge's reasoning. The judge was aware that in *Gargan*, (the case upon which the reasonable hypothetical was based), a sentence of one-day imprisonment and 12 months' probation was determined to be a fit sentence; she was also aware that the sentence had been upheld on appeal by the Supreme Court of the Northwest Territories. (Although it was not before the appeal judge, I note that the Crown did not challenge the fitness of the one-day sentence when it unsuccessfully sought leave in the Northwest Territories Court of Appeal to appeal the constitutional ruling: *R. v. Gargan*, 2023 NWTCA 5).

[43] In short, the sentence in *Gargan* informed the appeal judge's assessment and her conclusion that a 90-day period of incarceration would be grossly disproportionate for the hypothetical offender in the scenario before her.

[44] The remaining grounds of appeal relate to the second stage of the framework: assessing whether the mandatory minimum penalties are grossly disproportionate to the sentences that would be imposed if the sentencing judge's discretion were not legislatively constrained. Each ground focuses on one of the three components identified by the Supreme Court of Canada in *Hills* as relevant to the second stage of the assessment. The Crown makes common submissions on these grounds in each of the two appeals, so it is convenient to address them together.

2. Did the appeal judge overstate the scope and reach of the offences?

[45] The appeal judge concluded that the mandatory minimum penalty for sexual exploitation could be grossly disproportionate for some offenders because "s. 153(1) applies to a broad spectrum of relationships, can be committed by offenders in very different circumstances, and in innumerable ways": *G.K.* at para. 56.

[46] The Crown says the judge erred in reaching this conclusion because she overlooked the inherent wrongfulness and harmfulness of the offence which limit its scope and reach. The Crown points out that the conduct captured by these offences is narrow because exploitation by definition always involves the breach of a relationship of trust with a young person, sexual interference always involves a sexual offence against a child, and both offences entail exploitation and harm, as it is inherently exploitive for an adult to apply physical force of a sexual nature to a child: *Friesen* at para. 78.

[47] In my respectful view, the Crown's description of these offences as encompassing a narrow range of conduct is contrary to the jurisprudence. Sexual interference was described by the Supreme Court of Canada in *Friesen* as a "broadly defined" offence that encompasses a "wide spectrum of conduct": at para. 91. In *R. v. Scofield*, 2019 BCCA 3, the British Columbia Court of Appeal described the offence in the same terms: at paras. 77–78. This Court determined in *E.O.* that the offence of sexual exploitation is sufficiently broad in scope for an associated mandatory minimum to be constitutionally vulnerable: at para. 53. The Court therefore struck down the one-year mandatory minimum sentence applicable to sexual exploitation where the Crown proceeds by indictment.

3. & 4. Did the appeal judge fail to consider the effects of the penalties on the hypothetical offenders or the objectives of the legislature?

[48] The last two grounds of appeal can be addressed together.

[49] First, the Crown submits that, because the appeal judge did not have the benefit of *Hills,* she failed to consider the effect of the 90-day mandatory minimum

penalties on the hypothetical offenders. The Crown contends it is evident that the effect of a short period of incarceration, which can be served intermittently, is not harsh or disproportionate even at the lower end of the spectrum of offending, and even if the offender has lower moral culpability due to mental health or *Gladue* factors.

[50] The Crown relies on *Bertrand Marchand*. In that case the Court held that a 30-day intermittent sentence for luring in the circumstances of the *Hood* hypothetical was not grossly disproportionate despite the serious cognitive limitations arising from the offender's mental illness: at paras. 124–125. The majority recognized that conditions of confinement can be disproportionately harsh on people with mental disorders and cognitive impairments but found that an intermittent sentence ameliorated those effects by allowing offenders to potentially preserve their employment, maintain familial and community ties, and continue specialized treatment that might not be available at a prison facility: at para. 160. It follows, says the Crown, that the effect of a 90-day mandatory minimum sentence is not harsh for an adult offender who intentionally violates the bodily integrity of a child to satisfy their own sexual desires, whether under s. 151(b) or s. 153(1)(a).

[51] Second, the Crown contends the judge did not consider the objectives of the legislature in providing for 90-day mandatory minimum sentences, as required by *Hills* at the second stage of the analysis.

[52] In *Hills*, the Supreme Court of Canada observed that greater deference is owed to Parliament "[w]here the consequences of the offence clearly offend Canadians' 'basic code of values' and call for a strong condemnation": at para. 139. The Crown argues that sexual exploitation and sexual interference are clearly such offences; unlike the offence of child luring, an inchoate preparatory offence designed to protect a range of interests in a remedial and preventative manner (*Bertrand Marchand* at para. 8.), sexual exploitation and sexual interference criminalize conduct that *Friesen* describes as constituting the overarching objective of the entire legislative scheme for all child sexual offences in the *Code*, namely "[p]rotecting

children from wrongful exploitation and harm": *Friesen* at para. 42. The Court called upon judges to recognize that Parliament identified the abuse of persons under the age of 18 and the abuse of a position of trust or authority as aggravating factors (*Code*, s. 718.2(a)(ii.1) and s. 718.2(a)(iii), respectively): *Friesen* at para. 116.

[53] The Crown argues that the mandatory minimum penalties reflect Parliament's effort to signal that those convicted of sexual exploitation and sexual interference should be separated from society, at least intermittently. The Crown submits this is a valid objective worthy of deference. A sentence served in the community would not have the same denunciatory or deterrent effect as a carceral sentence.

[54] It is evident that the judge did not have the benefit of the expanded gross disproportionality analysis in *Hills*, and accordingly did not express her reasons in terms of the components of the "effect on the offender" and "objectives of Parliament" at stage two of the framework. However, the majority in *Hills* does not insist on adherence to "a rigid test or fixed set of factors": at para. 147. The expanded framework is merely intended to assist judges in the task before them.

[55] In any event, I do not agree that the absence of an express reference to the components of the analysis means the judge failed to consider them. The expanded framework did not change the fundamental normative analysis; it simply made express what has always and necessarily been part of the assessment.

[56] It is in my view not possible for a judge to address gross disproportionality without considering the effect of a mandatory minimum on the offender in comparison to what would otherwise be considered a fit sentence; that comparison lies at the heart of the analysis. The comparison requires a judge to consider not only the nature of the penalty—incarceration versus a fine, solitary confinement versus retention in the general prison population, and so on—but also the length of any period of incarceration. A judge need not spell out their understanding that a longer sentence is more punitive; a judge is taken to understand that the longer someone is deprived of their liberty, the more onerous is the effect on the offender and their families, and the greater is the economic impact.

[57] As for the absence of express reference to the objectives of Parliament, I am again of the view that this step is necessarily inherent in any consideration of the constitutionality of a mandatory minimum. The assessment cannot be done in a vacuum, but is rather conducted in the context of the particular offence and the awareness that Parliament has deemed it to be of sufficient gravity and concern to warrant a mandatory penalty.

[58] In the present case, the reasons of the appeal judge demonstrate she was alive to Parliament's objective of denouncing and deterring sexual offending against children, the gravity of the offences in issue, the moral blameworthiness of the offenders, and the need for carceral sentences in most cases: *G.K*. at paras. 26, 29 and 31. She also took into account the effect on the offenders of serving an extended period of incarceration. That consideration is implicit in her conclusion that 90 days of imprisonment would be grossly disproportionate for the hypothetical offender who would otherwise receive a conditional sentence order or a much reduced period of incarceration (*G.K.* at para. 32; *D.A.D.* at para. 28).

[59] The Crown submits that the deleterious effects of a mandatory period of incarceration can be ameliorated by imposition of an intermittent sentence. However, in light of the practical realities of the Yukon, and many other parts of this vast country, an intermittent sentence might not be possible. There is only one correctional facility in the Yukon which is located in Whitehorse. The communities that are connected by road are from two to six hours away by car when driving conditions are good. Residents of some communities can only travel to Whitehorse by plane. The cost, road and weather conditions, and time involved in repeated trips to Whitehorse to serve an intermittent sentence mean this sentencing option will not be available to many offenders.

Conclusion

[60] In general, incarceration should be imposed for sexual offences involving children, and conditional sentences served in the community will not suffice: *R. v. Hagen*, 2021 BCCA 208 at paras. 41–42; *R. v. M.S.*, 2003 SKCA 33 at para. 11; *R.*

v. Paradee, 2013 ABCA 41 at paras. 15–16; and *R. v. J.A.G.*, 2008 MBCA 55 at para. 23. But there are exceptions to this general rule; in rare cases involving sexual offences against children, a non-carceral sentence may be appropriate: *Bertrand Marchand* at paras. 130, 133; *Scofield* at para. 70. It is in relation to those exceptional cases that a mandatory period of incarceration of 90 days will be grossly disproportionate.

[61] I conclude that the Crown has not established material error in the appeal judge's determination that the 90-day mandatory minimum sentences for the summary offences of sexual exploitation and sexual interference breach s. 12 of the *Charter.*

Disposition

[62] I would dismiss both appeals.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Cooper"