Citation: *R. v. Pye*, 2019 YKTC 21

Date: 20190417
Docket: 17-00306
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

BRAYDEN DOUGLAS ALEXANDER PYE

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

Appearances:
Leo Lane — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

REASONS FOR SENTENCE

[1] RUDDY J. (Oral): Brayden Pye has entered a guilty plea to one count of touching a person under the age of 16 years for a sexual purpose contrary to s. 151(b) of the *Criminal Code*.

Facts

[2] The facts are set out in an agreed statement, which indicates that Mr. Pye and C.R. met in the Spring of 2017. He was 21 and she was 14. Over the next two months, there were two incidents of sexual contact between them. There is no indication that

Mr. Pye was aware of C.R.'s age at that time. However, in mid-July, Mr. Pye admits he was made aware of C.R.'s age.

[3] On July 31, 2017, the two agreed to meet. Mr. Pye picked C.R. up at her home. She brought a 26-ounce bottle of vodka. He stopped to buy beer. They went to Mr. Pye's home where they sat on his bed drinking and watching a movie. They kissed for a while, and then Mr. Pye had sexual intercourse with C.R.

[4] C.R. told her sister what had happened when she got home. Her sister took her to Whitehorse General Hospital for a sexual assault examination. The next afternoon, C.R. made a complaint to the RCMP.

[5] Mr. Pye was arrested later that evening, and provided a statement in which he admitted that he had known for a couple of weeks that C.R. was only 14 years old.

[6] The Agreed Statement of Facts is silent on the question of consent.

Issues

[7] Crown and defence counsel take very different positions on the appropriate sentence in this case. Crown seeks a sentence of 12 months' imprisonment followed by probation, with ancillary orders for DNA and compliance with the *Sex Offender Information Registration Act* for a period of 10 years. While defence counsel's written submissions suggested consideration of a suspended sentence as her starting position, her oral submissions focussed on the position that a conditional sentence order of six months would be appropriate in all the circumstances.

[8] The Crown has elected to proceed summarily. Pursuant to s. 151(b) of the *Criminal Code*, the statutorily prescribed sentencing range is between a maximum term of imprisonment of two years less a day and a mandatory minimum punishment of 90 days in jail. Section 742.1(b) precludes the imposition of a conditional sentence order for offences punishable by a minimum term of imprisonment.

[9] Defence counsel has filed a Notice of Application seeking a ruling that the mandatory minimum sentence in s. 151(b) infringes s. 12 of the *Charter*.

[10] Accordingly, the two issues to be decided are:

1. Does the mandatory minimum sentence provision in s. 151(b) amount to cruel and unusual punishment contrary to s. 12 of the *Charter*; and
2. Subject to the determination of the first issue, what is the appropriate sentence on the circumstances of this case?

Section 12

Positions of Counsel

[11] In advancing the s. 12 argument, defence counsel concedes that the mandatory 90-day jail sentence would not be grossly disproportionate in its application to Mr. Pye and the circumstances of this case. Instead, she argues that it would result in a grossly disproportionate sentence in its reasonably foreseeable application to other offenders in reasonable hypothetical situations. In particular, she notes that the mandatory minimum constrains the Court's ability to address *Gladue* and mental health factors in the sentencing process.

[12] Crown concedes that a 90-day sentence would be excessive in at least one of the two hypotheticals advanced by the defence, but argues that "excessive" falls short of the gross disproportionality required to establish a violation of s. 12 of the *Charter.* He notes that an excessive sentence on any reasonably foreseeable hypothetical would not outrage standards of decency in light of the pervasive and persistent problem of child sexual abuse and the resulting harm caused.

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

The Legal Framework

[14] Section 12 of the *Charter* guarantees that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment". The recent Supreme Court of Canada decisions in *R. v. Nur,* 2015 SCC 15*,* and *R. v. Lloyd,* 2016 SCC 13, have affirmed the test to be applied and the process to be followed in s. 12 applications.

[15] In the *Lloyd* decision, McLachlin C.J set out the analytical framework at paras. 22-24 as follows:

> 22 The analytical framework to determine whether a sentence constitutes a "cruel and unusual" punishment under s. 12 of the *Charter* was recently clarified by this Court in *Nur*. A sentence will infringe s. 12 if it is "grossly disproportionate" to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: *Nur*, at para. 39; *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. A law will violate s. 12 if it imposes a grossly disproportionate sentence on the individual before the court, or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others: *Nur*, at para. 77.

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

[16] The framework requires the court first to consider whether the mandatory minimum sentence would result in a sentence that would be grossly disproportionate with respect to the circumstances of the offence and of the offender before the court at the time the challenge is brought. If not, the court is to consider whether the provision may result in grossly disproportionate sentences for other, hypothetical, offenders in circumstances that may reasonably be expected to arise (*Nur* at para. 77).

Appropriate sentence

[17] As mandated in the analytical framework, consideration must first be given to a determination of the appropriate sentence in this case. While defence counsel is not suggesting that the mandatory minimum punishment would be grossly disproportionate in relation to Mr. Pye on these facts, should I conclude that neither a sentence of less than 90 days' imprisonment nor a conditional sentence would be appropriate in this case, it is open to me to decline to rule on the s. 12 application on the basis it would have virtually no impact on the imposition of the appropriate sentence (see. *R. v. E.O.,* 2018 YKTC 28).

[18] Mr. Pye's personal circumstances are outlined in a detailed letter from his mother, a *Gladue* Report, and a psychological assessment conducted by Nicole Bringsli, which Mr. Pye participated in of his own volition.

[19] Mr. Pye comes before the court with no prior criminal record. He is approaching his 23rd birthday. His mother was raised in the Dawson Creek area. Her mother was adopted into the Liard First Nation; her father was an alcoholic. Mr. Pye's mother notes that during Mr. Pye's childhood she was preoccupied dealing with her brother's significant addiction issues and believes this was detrimental to Mr. Pye's development.

[20] Mr. Pye's father is a member of the Liard First Nation. His paternal grandmother attended the Lower Post residential school. Mr. Pye's father describes his relationship with his mother as lacking in emotional attachment. He feels that she raised her children in a manner similar to what she experienced in residential school, including a focus on cleanliness. Mr. Pye's father was physically abused and exposed to

substance abuse at an early age. He feels he approached fatherhood by raising Mr. Pye in the same dysfunctional manner in which he had been raised.

[21] During his childhood, Mr. Pye was exposed to his father's abuse of alcohol and frequent absences. When he was home, Mr. Pye's father was noted to be both verbally and physically abusive to Mr. Pye's mother, and, on occasion, to Mr. Pye. Mr. Pye's parents divorced when he was in high school, which came as a shock to Mr. Pye resulting in a difficult adjustment for him.

[22] Mr. Pye began using alcohol and marijuana at age 10 or 11. He started using cocaine and mushrooms at age 15 or 16. It is evident that Mr. Pye's use of substances, particularly alcohol, has evolved into a significant addiction over time. His mother started noticing changes in his behaviour in grade 8. School reports show issues with focus, and note that Mr. Pye was easily distracted. Testing suggested some learning limitations, particularly in math. Mr. Pye dropped out of school in 2012.

[23] Mr. Pye lost his maternal uncle in 2015 as a result of substance abuse. He lost his maternal grandmother, with whom he was particularly close, in 2016. It is also noted that Mr. Pye has suffered some head injuries including as the victim of a bad assault when he was in grade 9 while trying to defend someone else, a slip and fall in 2007, and a motor vehicle accident a couple of years ago.

[24] On a positive note, Mr. Pye has a good employment history. He worked with P&M Recycling for three years, and has been with Griffith's Heating and Sheet Metal, where his father is manager, for the last six years. Mr. Pye has completed the Oil

Burning Mechanics program at Yukon College, but, unfortunately, has had difficulty passing the final exam, despite three attempts.

[25] Mr. Pye is currently residing with his father, and is in a stable, age-appropriate relationship of just under two years in duration. Both of his parents, who appear to have come some distance in addressing their own issues, are extremely supportive of Mr. Pye, as is his girlfriend.

[26] The psychological assessment completed on February 8, 2019 notes that Mr. Pye struggles with communication. He tends to internalize and lacks the skills to communicate and emotionally process. His intellectual profile falls below average. He displays deficits in attention and is prone to making careless mistakes. He meets the criteria for Attention Deficit Hyperactivity Disorder, a severe alcohol use disorder, and a major depressive disorder. It is noted that marijuana is also likely problematic for him as it would interfere with emotional processing and self-regulation where he tends to struggle.

[27] With respect to the offence, Ms. Bringsli opines that with Mr. Pye's:

> …deficit in effective communication, low self-concept and a depressive profile, it seems that he began a relationship with this young girl and may have felt initially adequate with her (as she likely would have had less life experience and maturity compared to someone his own age) as he has interpersonal struggles as well as issues with processing. …

[28] Ms. Bringsli further notes the impact of Mr. Pye's substance use in lowering his inhibitions as a likely contributing factor in the current offence. She notes that "Mr. Pye's risk factors for engaging in behaviours without thinking of consequences will

continue to remain if he does not address his communication and substance use problems". However, Ms. Bringsli also notes that there is no history of aggression, including sexual aggression. Mr. Pye is at moderate to low risk to reoffend sexually on the STATIC-99R, and the assessment notes no sexual deviancy in his thinking. Indeed, Ms. Bringsli recommends that Mr. Pye's treatment focus on addressing alcohol use, inattention, self-concept and mood-related issues rather than sex offender programming as Mr. Pye is at low risk to re-offend.

[29] I am advised that it is Mr. Pye's intention to pursue treatment as recommended in the psychological assessment, including meeting with Ms. Bringsli. As at the date of sentencing, Mr. Pye had been completely sober for one month.

[30] Mr. Pye's father indicated that he has noticed a change in Mr. Pye's behaviour for the better, and his mother noted that Mr. Pye is very remorseful. Mr. Pye indicated that he never meant to cause any physical or mental harm. He deeply regrets his actions, and is both ashamed and disgusted by his behaviour. Though his plea was not an early one, I am nonetheless satisfied that his remorse is genuine.

[31] In summary, the reports demonstrate significant *Gladue* factors that have negatively affected Mr. Pye's development. The overall picture is of a young Aboriginal man who presents as significantly younger and less mature than his chronological age would suggest, but one who has gained insight into his actions and learned the steps he needs to take to ensure that he is not at risk for future offences. I am satisfied the offence was out of character, and that Mr. Pye is at low risk to reoffend.

[32] With respect to the impact of the offence on the young victim, C.R. has declined to provide a Victim Impact Statement, which is certainly her right. However, the lack of a Victim Impact Statement coupled with the fact the Agreed Statement of Facts is silent on the question of consent, which counsel have asked that I treat as a neutral factor, make it difficult to ascertain with any certainty the nature of the impact of this offence on C.R. That being said, the law is well settled that I may take judicial notice of the likelihood of psychological harm to a victim of a sexual offence (see *R. v. Rosenthal*, 2015 YKCA 1, at para. 6; and *E.O,* at para. 89). This would be particularly so for victims under the age of 18 as in this case.

[33] In terms of the applicable sentencing range, counsel have provided numerous cases denoting an extremely broad scope in both the nature of the offences and in the sentences imposed, ranging from suspended sentences at the low end to a three-year prison term at the upper end.

[34] While I have considered each of the cases, I find the cases from the Yukon to be the most relevant and persuasive with respect to sentencing range. In considering the Yukon cases, I am mindful of the oft-quoted decision of *R. v. White*, 2008 YKSC 34 out of the Yukon Supreme Court, which established a range of 12 - 30 months for full intercourse sexual offences involving adult victims incapable of consenting (see para. 85). This sentencing range was adopted by the Yukon Court of Appeal in *Rosenthal* (see para. 7).

[35] Four of the Yukon cases, *R. v. Butler*, 2014 YKTC 67; *R. v. Menicoche*, 2016 YKCA 7; *R. v. Quintal*, 2016 YKTC 46; and *R. v. Mathieson,* 2018 YKSC 49, include

victims and offenders of similar age differences to those in this case, and greater similarity on the facts of the offences. These four cases range from a low of nine months' custody in *Mathieson* to a high of 17 months' custody in *Menicoche*.

[36] In *Menicoche*, the offender was 26 and the victim was 15. The two had met on Facebook, and the offender invited the victim over for a drink. The offence involved non-consensual intercourse in circumstances that are objectively more aggravating than in this case. The offender tried to hold and kiss the victim and was clearly told no. The victim then fell asleep only to wake and find the offender having intercourse with her. The offender had a criminal record for assault, albeit some seven years earlier.

[37] In *Butler*, the offender was sentenced to 15 months' custody in addition to 25 days spent in pre-trial custody. The circumstances of the offence are similar to those before me. The 23-year-old offender had sexual intercourse with the 14-year-old victim in circumstances where consent was questionable; however, the case is distinguishable on the circumstances of the offender. The non-aboriginal offender had a criminal record that included three recent convictions for violent offences, and a more dated conviction for sexual interference committed while a youth. In addition, the offender demonstrated little remorse, engaged in victim blaming, and had limited rehabilitative prospects.

[38] In *Quinta*l, the 18-year-old offender had intercourse with the 13-year-old victim. She was too scared to say anything. The offender entered a guilty plea to a summary conviction sexual assault. The victim suffered significant emotional and psychological harm. The offender had a good work history and supportive family. There were

significant *Gladue* factors and the sentencing judges was satisfied the offence was out of character. The offender was sentenced to 10 months in jail.

[39] In *Mathieson*, the 27-year-old offender and 14-year-old victim engaged in one instance of consensual intercourse. The offender pleaded guilty to a summary conviction sexual assault, with a mandatory minimum of six months. There were significant *Gladue* factors and positive rehabilitative prospects. On appeal to the Yukon Supreme Court, the sentence of six months was raised to nine months, although the appeal judge declined to re-incarcerate as the offender had served his sentence.

[40] In my view, the *Quintal* and *Mathieson* decisions are closest to the case before me in relation to the circumstances of both offence and offender. However, I would note that the mandatory minimum was not challenged in either of those cases; nor was there any discussion about the appropriateness of a conditional sentence in either case as is urged by defence counsel in relation to Mr. Pye.

[41] Based on these cases, I would conclude that a straight custodial term in the range of nine to 10 months would be the appropriate starting point for Mr. Pye, in the absence of the availability of a conditional sentence.

[42] The appropriateness of a conditional sentence, if available, requires a balancing of the often-conflicting principles of denunciation and deterrence on the one hand, and rehabilitation and the application of s. 718.2(e) on the other.

[43] Section 718.01 of the *Criminal Code* requires the court to give primary consideration to denunciation and deterrence in imposing sentences in cases involving

the abuse of persons under the age of 18. Similarly, s. 718.2(a)(ii.1) makes the abuse of a person under age 18 a statutorily aggravating factor in sentencing.

[44] Section 718.2(e) requires the court to consider all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims, with particular attention to the circumstances of Aboriginal offenders. In *R. v. Gladue,* [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada has spoken at length about the overrepresentation of Aboriginal offenders in our penal institutions and the need for the courts to take a restorative approach in sentencing to ameliorate this pervasive overrepresentation. In *Gladue*, the Court noted at para. 81:

> The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the *Criminal Code* and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2 (*e*), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

[45] How then to reconcile these differing sentencing objectives. In my view, one must consider what is necessary to give effect to denunciation and deterrence. The

intention of denunciation is clearly to signal society's abhorrence for particular types of offences, of which a sexual offence against a child would certainly be one (see *R. v. Allen*, 2012 BCCA 377). Deterrence is intended to send a clear message to Mr. Pye and to others that such behaviour will not be tolerated, in an effort to deter similar conduct. But the real question is whether a jail sentence is the only way to send a clear denunciatory and deterrent message.

[46] In my view, it is not. Deterrence can take many forms, including the imposition of criminal charges, a criminal record, and the stigma that flows from the very public nature of criminal justice proceedings, particularly in the smaller communities one finds in the Yukon, where such offences rarely go unnoticed by the media and are regularly debated in the court of public opinion.

[47] In addition, many sentences impose restrictions on liberty short of jail which may still have a deterrent effect. In *R. v. Proulx*, 2000 SCC 5, the Supreme Court of Canada noted at paras. 98-100:

> 98 The conditional sentence, as I have already noted, was introduced in the amendments to Part XXIII of the *Code*. Two of the main objectives underlying the reform of Part XXIII were to reduce the use of incarceration as a sanction and to give greater prominence to the principles of restorative justice in sentencing – the objectives of rehabilitation, reparation to the victim and the community, and the promotion of a sense of responsibility in the offender.
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> 99 The conditional sentence facilitates the achievement of both of Parliament's objectives. It affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community, and the promotion of a sense of responsibility in ways that jail cannot. However, it is also a punitive sanction. Indeed, it is the punitive aspect of a conditional sentence that distinguishes it from probation. As discussed above, it was not Parliament's intention that offenders who would otherwise have gone

> to jail for up to two years less a day now be given probation or some equivalent thereof.
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> 100 Thus, a conditional sentence can achieve both punitive and restorative objectives. To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to [page 115] incarceration where appropriate in the circumstances.

[48] A conditional sentence requires consideration of whether it would be consistent with the fundamental purpose and principles of sentencing and whether service of the sentence in the community would endanger the community.

[49] In terms of the principles of sentencing, specifically denunciation and deterrence, it is often argued that a conditional sentence ought not to be available for certain types of offences, sexual offences against children among them. I would note however that the Supreme Court of Canada cautioned against such an approach at paras. 80-82 of the *Proulx* decision:

> 80 Several parties in the appeals before us argued that the fundamental purpose and principles of sentencing support a presumption against conditional sentences for certain offences. The Attorney General of Canada and the Attorney General for Ontario submitted that a conditional sentence would rarely be appropriate for offences such as: sexual offences against children; aggravated sexual assault; manslaughter; serious fraud or theft; serious morality offences; impaired or dangerous driving causing death or bodily harm; and trafficking or possession of certain narcotics. They submitted that this followed from the principle of proportionality as well as from a consideration of the objectives of

> denunciation and deterrence. A number of appellate court decisions support this position.
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> 81 In my view, while the gravity of such offences is clearly relevant to determining whether a conditional sentence is appropriate in the circumstances, it would be both unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences. Offence-specific presumptions introduce unwarranted rigidity in the determination of whether a conditional sentence is a just and appropriate sanction. Such presumptions do not accord [page 107] with the principle of proportionality set out in s. 718.1 and the value of individualization in sentencing, nor are they necessary to achieve the important objectives of uniformity and consistency in the use of conditional sentences.
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> 82 This Court has held on a number of occasions that sentencing is an individualized process, in which the trial judge has considerable discretion in fashioning a fit sentence. The rationale behind this approach stems from the principle of proportionality, the fundamental principle of sentencing, which provides that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the "punishment fits the crime". As a by-product of such an individualized approach, there will be inevitable variation in sentences imposed for particular crimes.

[50] In considering the appropriateness of a conditional sentence in relation to Mr. Pye, I conclude that service of his sentence in the community pursuant to a conditional sentence order would be appropriate, if available, for the following reasons:

- His young age and relative immaturity;
- His clear remorse;
- His willingness to engage in a psychological assessment and in treatment (although I would have preferred to see greater efforts underway);
- There is no indication his actions were predatory;
- There was no breach of trust;
- His lack of a prior criminal record;

- The offence is out of character;
- He is at low risk to re-offend;
- His mental health issues (although these are less pronounced then those identified in some of the cases that have been filed);
- His supportive family and girlfriend;
- His positive record of employment; and
- The clear *Gladue* factors present in this case, and their obvious impact on his development.

[51] All of these factors satisfy me that a conditional sentence, would not endanger the community and, if available, would be the appropriate sentence in this case. However, given the seriousness of the offence, I am also of the view that to meet the principles of denunciation and deterrence in this case a conditional sentence would need to be strict house arrest and should be longer than the straight custodial term I would otherwise impose. In my view, a conditional sentence of 12 months would be the appropriate sentence in the circumstances of this case, followed by a period of probation.

Section 12 Analysis

[52] Given the lack of availability of a conditional sentence due to the mandatory minimum sentence in s. 151(b), it is clearly necessary for me to address the s. 12 *Charter* application in this case.

Reasonable hypotheticals

[53] As my assessment of appropriate sentence makes it clear that the 90-day mandatory minimum sentence would not be grossly disproportionate in relation to Mr.

Pye, the application will need to be decided with reference to reasonable hypotheticals. The Court in *Nur* has made it clear that such reasonable hypotheticals need not be limited to situations likely to arise on a frequent basis. They need only be situations that may reasonably arise; meaning they are not far-fetched or only marginally imaginable (*Nur* at para. 56-57). In considering reasonable hypotheticals, the court can consider actual experience, common sense, and reported case law. The reasonable hypotheticals may include personal characteristics so long as such characteristics are also reasonably foreseeable (*Nur* at para. 74).

[54] At para. 27 of her written factum, defence counsel offers two hypotheticals for consideration:

> 1. The accused is a 20 year old with no criminal record. She struggles with alcohol addiction issues. The complainant is a 14 year old. At a party, the accused consumed alcohol and kisses the complainant on the cheek. The complainant did not consent to this and complains to his parents. The accused is charged with sexual interference. Before sentencing, she completes a residential rehabilitation program for alcohol use. She pleads guilty and expresses extreme remorse for her conduct.
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> 2. The accused is a 19 year old high school student. He is 30 days past his 18th birthday. His girlfriend, another student, is 14 years old. They have a 5 year and 30 day age gap between them. They have a happy respectful relationship. The accused kisses his girlfriend on the mouth and cheek, and hugs her on many occasions. There is no allegation that any contact is coercive or exploitative. However, it is observed by her parents, who contact the police. The accused is Aboriginal and has a history of intergenerational trauma from the residential school history in his family and community. He and his girlfriend wish to continue their relationship.

[55] Defence counsel stresses the limitations occasioned by mandatory minimum sentences with respect to the court's ability to craft fit sentences for Aboriginal offenders

and offenders with mental health issues in arguing that the mandatory minimum sentence in s. 151(b) would amount to grossly disproportionate sentences in its application to reasonably foreseeable hypotheticals including the two outlined in her factum.

[56] Crown counsel argues that the first of the two hypotheticals is not a reasonably foreseeable scenario on the basis that an offence would not be made out on the facts. In support of his position he points to the recent acquittal in the case of *R. v. Laxton,* 2017 YKTC 44, in which Faulkner J. determined that the hugging and kissing of a casual acquaintance did not amount to a sexual assault because there was a doubt that the kissing was sexual in nature. In my view, the scenario presented by defence counsel would require only minimal changes, such as the kiss being on the lips accompanied by words expressing a sexual interest, to make out an offence contrary to s. 151(b). I would also find that such a scenario would be reasonably foreseeable.

[57] With respect to the second hypothetical, Crown concedes that a 90-day jail term would be excessive, but argues that it would not amount to gross disproportionality. Indeed, he argues that a 90-day jail sentence would not be grossly disproportionate on any reasonably foreseeable hypothetical, as the mandatory minimum punishment, along with provisions like the aforementioned s. 718.01 and 718.2(a)(ii.1), is intended to send a clear message of society's abhorrence of offences involving the abuse of children. He argues that courts should exercise restraint when asked to controvert clear legislative intent.

[58] The real issue to be decided in this case, therefore, is one of degree: would the 90-day mandatory minimum when viewed in relation to reasonable hypotheticals result in punishment that is grossly disproportionate or merely excessive.

Case Law

[59] There are a number of decided cases since *Nur* and *Lloyd*, which have held that various mandatory minimum sentencing provisions violate s. 12 of the *Charter*. Relevant cases include several in which the one-year mandatory minimum sentence prescribed in s. 151(a) which applies where the Crown elects to proceed by indictment have been struck down (see *R. v. Scofield,* 2019 BCCA 3; *R. v. Hood*, 2018 NSCA 18; and *R. v. E.R.D.R.,* 2016 BCSC 1759).

[60] While the weight of appellate authority favours striking down the more severe one-year mandatory minimum in s. 151(a), the case law in relation to the constitutionality of the 90-day minimum in s. 151(b) is mixed.

[61] In reviewing the numerous cases that have been filed, it is fair to say that the opposing positions of counsel in this case fairly reflect the tension that must be resolved in deciding whether the impact of the 90-day mandatory minimum can withstand constitutional scrutiny: the importance of protecting children from abuse by sending a clear denunciatory message as articulated through the legislative intent of Parliament versus the flexibility to craft a sentence which accounts for personal characteristics such as Aboriginal heritage or mental health issues that may affect moral blameworthiness.

[62] The Supreme Court of Canada, in setting the high bar to be met in assessing whether a mandatory minimum is grossly disproportionate, has clearly held that care must be taken in interfering with the will of Parliament, noting at para. 45 of the *Lloyd* decision:

> Parliament has the power to make policy choices with respect to the imposition of punishment for criminal activities and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society. Courts owe Parliament deference in a s. 12 analysis. As Borins Dist. Ct. J. stated in an oft-approved passage:
>
> > It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency. (*R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont.), at p. 238)

[63] Numerous cases, in turn, have signalled the particular importance of protecting vulnerable children from abuse, the laudable goal underpinning some of Parliament's more recent legislative changes (see *Allen* and *R. v. Hajar,* 2016 ABCA 222).

[64] Conversely, the Supreme Court of Canada has also noted the barriers presented by mandatory minimums for judges attempting to reconcile the different goals that must be considered and balanced in the sentencing process. At paras.42-44 of the *Nur* decision, the Court noted:

42 In reconciling these different goals, the fundamental principle of sentencing under s. 718.1 of the *Criminal Code* is that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

43 It is no surprise, in view of the constraints on sentencing, that imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 80. "Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533, per Wilson J. As LeBel J. explained in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system.
>
> …
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. [para. 37]

44 Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.

[65] With respect to indigenous offenders, the Truth and Reconciliation Commission's final report noted that:

> Bill C-10 and other similar *Criminal Code* amendments have undermined the 1996 reforms that required judges to consider all reasonable alternatives to imprisonment, with particular attention to the circumstances of Aboriginal offenders. The Commission believes that the recent introduction of mandatory minimum sentences and restrictions on conditional sentences will increase Aboriginal overrepresentation in prison. Such developments are preventing judges from implementing community sanctions even when they are consistent with the safety of the community and even when they have a much greater potential than imprisonment to respond to the intergenerational legacy of residential schools that often results in offences by Aboriginal persons (p. 173).

[66] Cases, such as *R. v. Itturiligaq,* 2018 NUCJ 31, out of the Nunavut Supreme Court, have struck down mandatory minimum sentences, albeit in relation to non-sexual offences, on the basis they prevent the court from meeting its legal and moral obligation to consider an offender's Aboriginal heritage in crafting a fit sentence.

[67] Similarly, cases involving offenders with profound mental health issues have led to findings that mandatory minimum sentences result in grossly disproportionate sentences. In *R. v. Swaby*, 2018 BCCA 416, for instance, the B.C. Court of Appeal upheld a finding that the 90-day mandatory minimum was grossly disproportionate for an offence of possession of child pornography contrary to s. 163.1(4) on the basis that a period of imprisonment even if served on an intermittent basis would cause significant harm to the offender in light of his significant cognitive impairments and mental health problems (see also *Hood*; *R. v. Okoro*, [2018] O.J. No. 2102 (Ont. Ct. J.); and *R. v. J.L.M.*, 2017 BCCA 258).

[68] As noted, the cases attempting to reconcile this tension in assessing the constitutionality of the 90-day mandatory minimum sentence in s. 151(b) have gone both ways. Cases finding that the current mandatory minimum provision in s. 151(b) ought not to be struck down include *R. v. C.F.*, 2016 ONCJ 302, and *R. v. R.R.G.S.,* 2014 BCPC 170. Crown has also filed two unsuccessful challenges to the predecessor mandatory minimum of 45 days in effect before 2012, *R. v. S.A.,* 2016 ONSC 5355 and *R. v. Aldersley,* 2018 BCSC 734. As the law in relation to mandatory minimums continues to evolve, I find the cases in relation to the existing mandatory minimum of most relevance.

[69] In *C.F.,* the 18-year-old offender was convicted after trial on facts including that he mimicked sexual positions with the younger sister of his girlfriend and had her touch his penis. The trial judge noted the gravity of the offence and concluded that he would have imposed a sentence of 60 days, but rejected the s. 12 application on the basis that he could not conclude that a 90-day sentence would be grossly disproportionate. No reasonable hypotheticals were provided to the court.

[70] In *R.R.G.S.,* the 27-year-old offender entered the 14-year-old victim's bedroom where she was sleeping. He touched her neck and back and moved her legs apart. She woke up and told him to stop, which he did. While there was a suggestion that the offender may suffer from Fetal Alcohol Effects, the BC Provincial Court found that it had not been established on the evidence. In assessing the appropriate sentence, Birnie J. found that a conditional sentence would likely be appropriate, but was not available. The trial judge rejected the s. 12 application on the basis that the mandatory minimum sentence would not be grossly disproportionate in relation to the offender and that the

inability to impose a conditional sentence did not in and of itself render the sentence disproportionate. It appears no reasonable hypotheticals were presented or considered.

[71] The most recent decision upholding a related mandatory minimum sentence of 90-days with respect to an offence contrary to s. 152(b) is the 2017 decision of the BC Provincial Court in *R. v. Gumban,* 2017 BCPC 226. In the decision, the Court does consider reasonable hypotheticals, but finds them to be far-fetched; however, I would agree with the view expressed by Shrek J. in *R. v. Drummonde*, 2019 ONSC 1005, in concluding that the proposed hypotheticals in *Gumban* are not far-fetched. At para. 61 of *Drummonde*, Shrek J notes:

> In *R. v. Gumban*, 2017 BCPC 226, the court concluded that the 90-day MMS in s. 151(*b*) was not grossly disproportionate when applied to the offender before the court. The court also considered two hypotheticals. In the first, a 20-year-old Aboriginal offender of good character who had himself been the victim of sexual abuse engaged in sexual activity with a person who is actually five years younger than him. In the second, the same offender believes the other person to be 16, but fails to take reasonable steps to confirm this. The court in *Gumban* found these hypotheticals to be "far-fetched" and was of the view that a 90-day sentence would not be grossly disproportionate. With respect, I disagree on both points. As the facts of *J.G.* illustrate, a situation in which consensual sexual activity occurs between individuals who are just slightly more than five years apart in age is not far-fetched. Depending on the nature of the contact and the antecedents of the accused, a 90-day prison sentence may well be grossly disproportionate in such circumstances.

[72] While defence counsel has provided three decisions finding that the 90-day mandatory minimum sentence in s. 151(b) violates s. 12 of the *Charter*: *Drummonde*, *R. v. J.G.,* 2017 ONCJ 881 and *R. v. Brandon Boeyenga* (November 2, 2016*)*, Midland (O.N.C.J. per Main J.), I find *Drummonde* to be the most persuasive.

[73] *Drummonde* is a decision of the Ontario Superior Court of Justice upholding, on appeal, a trial judge's finding that the mandatory minimum, while not grossly disproportionate in relation to the offender, was nonetheless grossly disproportionate in its application to reasonably foreseeable hypotheticals. I find the decision to be thorough and well-reasoned, and have little difficulty in adopting the rationale and findings of Justice Shrek.

[74] In particular, I would agree with the finding that s. 151, while a specific intent offence, nonetheless is an offence that can be committed in an infinite variety of ways, capturing a broad range of both activities and offenders, and that this wide net makes it constitutionally vulnerable. At paras. 46-49, Shrek J. notes:

> 46 As was observed in *Lloyd*, at para. 3, the success of a s. 12 challenge will often depend on the range of conduct caught by the offence in question (at para. 3):
>
> > As this Court's decision in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, illustrates, the reality is that mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence.
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> 47 The appellant submits that s. 151 of the *Criminal Code* captures only a narrow range of conduct such that the MMS will never be grossly disproportionate. The trial judge was of the view that there are "infinitely variable ways" in which the offence can be committed, which increases the likelihood that the MMS is constitutionally unsound. I agree with the trial judge.
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> 48 The trial judge based her conclusion that s. 151 captures a broad range of conduct on *R. v. M.B.*, 2013 ONCA 493, at para. 21 where Strathy J.A. (as he then was) noted in relation to the offence of sexual exploitation contrary to s. 153 of the *Code* that "there are infinitely variable ways in which the offence can be committed and a wide range of

> offenders." Section 153 has basically the same essential elements as s. 151, as well as the additional element that the accused be in a position of trust or authority to the victim or that the victim be in a relationship of dependency to the accused. It follows that if s. 153 captures a broad range of conduct, the range of conduct captured by s. 151 is even broader: *Caron Barette*, at para. 98; *R. c. Jomphe*, 2016 QCCQ 11271, at para. 60.
>
> 49 The appellant is correct that s. 151 creates a specific intent offence, unlike sexual assault, and the Crown must prove that the touching was for a sexual purpose. As well, s. 150.1 of the *Code* sets out certain exceptions in cases where the complainant consents to the touching and the accused's age is close to that of the complainant. Thus, an individual can only be convicted if the touching was for a sexual purpose and either the complainant did not consent or the accused was older than the complainant by a specified number of years. In this sense, the offence of sexual exploitation is not as broad as the offence of sexual assault. However, s. 151 applies to *any* touching on *any* part of the body.

[75] I further agree with the conclusion in *Drummonde* that there are reasonably foreseeable hypotheticals falling within the broad scope of behaviour and offenders captured by s. 151 for which a sentence of imprisonment would be grossly disproportionate (see paras. 50-63). This includes the unwanted kiss scenario relied on by the trial judge in *Drummonde*, based as it was on an actual case previously before the trial judge. To that hypothetical, I would add the two hypotheticals presented by defence counsel, with the minor amendments noted above. In both scenarios, I am of the view that the mandatory minimum jail term would be more than just excessive and would amount to a grossly disproportionate sentence. The notion that an unwanted kiss, or as in the second scenario, a kiss that is welcomed, would attract a jail term of at least 90 days solely on the basis of the age of the victim, would, in my view, be an abhorrent and intolerable sentence in the eyes of an educated public.

[76] My view is strengthened when I consider the fact pattern in *R. v. C.A.,* 2016 YKTC 43, a previous decision of mine. In *C.A.,* the 17-year-old victim was staying with the 21-year-old offender and the two would often sleep in the same bed. The two engaged in mutual massages, and the sexual assault complained of is that during one of those massages, the offender moved his hands too low on the victim's back. In addition, there were two or three occasions in which the offender touched the victim with his hand, on the hip and inner thigh area. The offender in *C.A.* entered a guilty plea to an offence contrary to s. 271 for which there was no applicable minimum. It is notable that, on the facts, the Crown conceded that a discharge was appropriate. At issue was whether the discharge should be conditional or absolute. While *C.A.* involved a different offence section, the victim was still under the age of 18. Had the victim been just two years younger, the activity would fall squarely within the behaviour captured by s. 151. In my view, the application of a mandatory 90-day jail sentence would clearly be grossly disproportionate in such circumstances.

[77] In the result, I am satisfied that the mandatory minimum punishment of 90 days in s. 151(b) is grossly disproportionate in its application to reasonably foreseeable hypotheticals in violation of s. 12 of the *Charter*. I am also satisfied that the mandatory minimum is not saved by s. 1.

[78] As noted in *Nur* at para. 45:

> General deterrence — using sentencing to send a message to discourage others from offending — is relevant. But it cannot, without more, sanitize a sentence against gross disproportionality: "General deterrence can support a sentence which is more severe while still within the range of punishments that are not cruel and unusual" (*R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 45, per Gonthier J.). Put simply, a person

> cannot be made to suffer a [page 801] grossly disproportionate punishment simply to send a message to discourage others from offending.

[79] As a statutory court, my jurisdiction does not extend to striking down the section; however, I can and do find that it is invalid in relation to the case before me (see *Lloyd* para. 15).

[80] Having concluded that the mandatory minimum sentence has no application to Mr. Pye, the barrier to a conditional sentence is removed, and I am in a position to impose the appropriate sentence as previously articulated. Accordingly, there will be a sentence of 12 months, but Mr. Pye will be entitled to serve his sentence in the community under strict conditions as follows:

1. Keep the peace and be of good behaviour;

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

3. Report to a Supervisor within two working days and thereafter, when required by the Supervisor and in the manner directed by the Supervisor;

4. Remain within the Yukon unless you have written permission from your Supervisor;

5. Notify the Supervisor in advance, of any change of name or address, and, promptly, of any change of employment or occupation;

6. Have no contact directly or indirectly or communication in any way with C.R. except with the prior written permission of your Supervisor and with the consent of C.R. in consultation with Victim Services;

7. Do not go to any known place of residence, employment or education of C.R. except with the prior written permission of your Supervisor and with the consent of C.R. in consultation with Victim Services;

8. Reside at [redacted], Whitehorse, Yukon, abide by the rules of the residence, and do not change that residence without the prior written permission of your Supervisor;

9. At all times, you are to remain inside your residence or on your property, except with the prior permission of your Supervisor, except for the purposes of employment including travel directly to and directly from your place of employment, except for the purposes of attending treatment or programming and including travel directly to and directly from treatment or programming. You must answer the door or the telephone to ensure you are in compliance with this condition. Failure to do so during reasonable hours will be a presumptive breach of this condition;

10. Not possess or consume alcohol, cannabis, and/or controlled drugs or substances that have not been prescribed for you by a medical doctor;

11. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub, or any premise whose primary purpose is the sale of cannabis;

12. Make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts;

13. Attend and actively participate in all assessment and counselling programs as directed by your Supervisor, and complete them to the satisfaction of your Supervisor, for the following issues: substance abuse, alcohol abuse, psychological issues, and any other issues identified by your Supervisor, and provide consents to release information to your Supervisor regarding your participation in any program you have been directed to do pursuant to this condition.

[81] As Mr. Pye is at the early stages of his rehabilitation, I am also of the view that a probation order of 18 months should follow his conditional sentence on the following terms:

1. Keep the peace and be of good behaviour;

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

3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;

4. Have no contact directly or indirectly or communication in any way with C.R. except with the prior written permission of your Probation Officer and with the consent of C.R. in consultation with Victim Services;

5. Do not go to any known place of residence, employment or education of C.R., except with the prior written permission of your Probation Officer and with the consent of C.R. in consultation with Victim Services;

6. Report to a Probation Officer immediately upon completion of your conditional sentence and thereafter, when and in the manner directed by the Probation Officer;

7. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues: substance abuse, alcohol abuse, psychological issues, and any other issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition.

[82] Mr. Pye will also be required to provide such samples of his blood as are necessary for DNA testing and banking, and he will be required to comply with the provisions of the *Sex Offender Information Registration Act* for a period of 10 years.

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RUDDY T.C.J.