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CANADA / JUDGMENT

## R. v. B.S.

2018 BCSC 2044

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COURT

Supreme Court of British Columbia

DECIDED

7 September 2018

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2018 BCSC 2044 R. v. B.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.S.,

2018 BCSC 2044

Date: 20180907

Docket: 24143-2

Registry: Smithers

Regina

v.

B.S.

Restriction on publication: Pursuant to s. 486.4(2) of the C.C.C.

Before: The Honourable Madam Justice Sharma

Oral Reasons for Sentence

Counsel for the Crown appearing by teleconference:

L. Vizsolyi

Counsel for the Crown:

P. Backhouse

Counsel for the Accused:

K. Jones

Place and Date of Trial/Hearing:

Smithers, B.C.

May 28, 29, 2018

Place and Date of Judgment:

Smithers, B.C.

### September 7, 2018

- [1] THE COURT: This is the first of two judgments addressing the sentence for B.S., whom I convicted of three offences on November 25, 2016 [R. v. B.S., 2016 BCSC 2468]:
1. Touching a person under the age of 16 for a sexual purpose contrary to s. 151 of the Criminal Code (the "Code");
  2. Communicating with a person under the age of 16 for the purpose of facilitating the commission of other offences contrary to s. 172.1(1)(b), of the Code; and,
  3. Sexually assaulting K.J. contrary to s. 271 of the Code.
- [2] Based on the Kienapple principle, a conditional stay was entered for the conviction under s. 271.
- [3] The remaining two offences have mandatory minimum sentences of one year imprisonment. The offender challenges the validity of those mandatory minimums by Notice of Constitutional Question dated March 24, 2017. He contends the mandatory minimum sentences violate s. 12 of the Charter, which prohibits punishment that is cruel and unusual.
- [4] The sentencing hearing was originally scheduled for June 8 and 9, 2017, but the offender discharged counsel just prior to that. He did not retain new counsel until September 2017. A presentencing report was prepared on March 20, 2018. A Gladue report was ordered in September 2017, but not produced until May 17, 2018. Submissions on sentence were made on May 28 and 29, 2018. Crown submits, and I agree that almost none of the delay between the conviction and this hearing was caused by the Crown or this Court.

### I. PRELIMINARY ISSUE

- [5] There is a preliminary issue: whether I need to consider the constitutional challenge to s. 151's mandatory minimum sentence. In R. v. Scofield, 2018 BCSC 91, Justice G.P. Weatherill held that 151 does violate s. 12 of the Charter, and at 2018 BCSC 419, he concluded that the violation was not saved by s. 1. Justice Weatherill therefore granted a declaration that the words in 151, "and to a minimum punishment of imprisonment for a term of one year" be of no force or effect. Crown counsel informed me the Court of Appeal is scheduled to hear the appeal in September 2018.

- [6] However, in *R. v. Horswill*, 2017 BCSC 35 and *R. v. E.M.Q.*, 2015 BCSC 201, this Court upheld the one year mandatory minimum sentence in s. 151 of the Code as not violating s. 12 of the Charter. The Court in *Scofield* refers to *E.M.Q.*, but there is no reference to *Horswill*.
- [7] Judicial comity requires that if another judge of this Court has made a decision on the precise legal issue before me, I follow that decision absent certain defined circumstances. I am faced with the somewhat unusual situation where there are inconsistent decisions of this Court discussing whether the mandatory minimum attached to s. 151 of the Code violates s. 12 of the Charter. The Crown suggested the failure to refer to *Horswill* may be a basis upon which I do not consider myself bound to follow *Scofield*. However, I do not agree.
- [8] *Scofield* is the most recent decision. That is important because at para. 71 of *R. v. Nur*, 2015 SCC 15, the Supreme Court of Canada addressed the effect of a ruling that a particular mandatory minimum sentence does not violate s. 12 of the Charter on future cases where the same minimum sentence applies. The Court addressed the following question: could an offender still argue in a future case that the provision violates s. 12 of the Charter? The Court indicated he or she could.
- [9] Chief Justice McLachlin stated that if the offender was merely re-arguing what constitutes a "reasonable foreseeable range" (part of the test under s. 12) then the argument should not proceed. That would be nothing more than arguing the previous decision was wrong. If, however, the offender relies on his different circumstances and evidence in his case, including mitigating factors specific to the offender, *stare decisis* would not operate to prevent the offender's constitutional challenge from possibly succeeding notwithstanding the previous decision. However, Chief Justice McLachlin also stated that the "threshold for revisiting the constitutionality of the mandatory minimum is high and requires a significant change in the reasonable foreseeable applications of the law".
- [10] For obvious reasons that does not work in the reverse; once this Court has held that a mandatory minimum infringes s. 12 and cannot be saved by s. 1, no set of different circumstances can make it valid for anyone else. That is because a provision that offends the Charter is, pursuant to s. 52 of the Constitution, of no force and effect.
- [11] Thus, the decisions Crown cites are not really inconsistent. Instead, Mr. *Scofield* succeeded in demonstrating that his circumstances warranted examining the issue anew as expressly permitted by *Nur*. Therefore, I do consider that I ought to follow the decision in *Scofield*, which declared the mandatory minimum in s. 151 of the Code to be of no force and effect. Accordingly, I do not address the Constitutional challenge of s. 151.

## II. ISSUES

- [12] These are three issues in this case:

1. What is a fit and just sentence for B.S.'s conviction under s. 151 of the Code?

2. Does the mandatory minimum one year's incarceration for conviction under s. 172.1 of the Code violate s. 12 of the Charter? If so, a further hearing will be scheduled to address whether the violation can be saved by s. 1 of the Charter.
  3. If the answer to question two is "no", what is the appropriate sentence for B.S.'s conviction under s. 172.1 of the Code, taking into account the mandatory one year's incarceration?
- [13] Crown seeks a sentence of 30 months for the conviction under s. 151 of the Code, and 12 to 15 months, to be served consecutively, for the s. 172.1 Code offence.

B.S.'s counsel submits that a conditional sentence of two years less a day, concurrent for both offences is fit and just because it would allow B.S. to engage in traditional restorative justice initiatives in his community.

### III. PRINCIPLES OF SENTENCING

- [14] Sentencing is a highly contextualized and nuanced process. The goals of a fit sentence are to encourage respect for the law and maintenance of a just, peaceful, and safe society. In assessing the proper sentence, the Court must heed the sentencing objectives articulated in 718 of the Code: denunciation, deterrence, separating offenders from society where necessary, rehabilitation, reparations, and promoting a sense of responsibility in offenders. The ultimate goal in sentencing is to arrive at a sentence that is "proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 7891.1 of the Code). This is a highly individualized exercise "tailored to the gravity of the offence, the blameworthiness of the offender, the harm caused by the crime" (Nur, at para. 43).
- [15] Section s. 718.2 of the Code requires the sentencing judge to increase or reduce a sentence according to aggravating or mitigating circumstances. Section 718.2(a) then deems the following to be aggravating circumstances:
- i. if the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor;
  - ii. if when committing the offence the offender abused his or her spouse or common-law partner;
  - iii. if in committing the offence the offender abused a person under the age of 18;
  - iv. if in committing the offence the offender abused a position of trust or authority in relation to the complainant;
  - v. if the offence had a significant impact on the victim considering his or her age and other personal circumstances, including health and financial situation;
  - vi. that the offence was committed for the benefit or in association with a criminal organization;
- or

vii. evidence that the offence was a terrorism offence.

[16] Four other factors must also be considered as listed at 718.2(b) to (e):

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) if consecutive sentences are imposed, the combined sentence cannot be unduly long or harsh;
- (d) the offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[Emphasis added.]

[17] In the case of *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada commented on section 718.2(e) of the Code, which was a legislative response to the over-representation in prisons of Aboriginal people. While the subsection does not change the fundamental duty of a sentencing judge to impose a proportional sentence, it does direct judges to approach the process of sentencing aboriginal offenders differently, meaning that the method of analysis used to determine the nature of a fit sentence must be sensitive to an Aboriginal offender (para. 75). The Court also pointed to sections 718, 718.2(e) and 742.1 of the Code, among others, to show that Parliament had placed a new emphasis upon decreasing the use of incarceration generally, and especially in relation to Aboriginal offenders (paras. 58 and 93).

[18] It is important to note that section 718.2(e) is remedial, aimed at ameliorating the serious problem of over-representation of Aboriginal persons in prisons. Sentencing judges are encouraged to look to restorative approaches for sentencing and there is a duty to give those options real force (para. 93). In particular, the different approach requires sentencing judges to consider the unique systemic or background factors that may have played a role in bringing that particular Aboriginal offender before the courts (para. 93).

[19] Sentencing judges must also consider the types of sentencing procedures and sanctions which may be appropriate because of the person's Aboriginal heritage. The Court was careful to point out the section was not simply a means of reducing a prison sentence for Aboriginal offenders and it should not be assumed that an offender is receiving a more lenient sentence simply because incarceration has not been imposed. In my view, the Court's message was, given the unique circumstances of Aboriginal offenders, a lesser period of incarceration or different type of sentence may be necessary in order to achieve the fundamental principle of proportionality for that offender. Or, to put it more bluntly, given the tragic history of Canada's treatment of Aboriginal Peoples, incarceration necessarily has a far greater negative impact on those offenders and Aboriginal

communities in general, which may need to be tempered by a lesser sentence in order to respect the fundamental principle of proportionality. Not doing so could result in the sentence being disproportionately harsh on an individual Aboriginal offender.

- [20] The issue was revisited in *R. v. Ipeelee*, 2012 SCC 13. The Supreme Court of Canada concluded that courts had been misapplying the principles from *Gladue* by suggesting that Aboriginal offenders must establish a causal link to background factors in the commission of the offence. The Court stated that such an approach revealed an inadequate understanding of the devastating intergenerational effects of the collective experience of Aboriginal Peoples. It also imposed an evidentiary burden that was not intended by this section or the previous cases. The Court also emphasized that *Gladue* principles apply to all offenses including those that are serious or violent. The Court summarized the approach as follows (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 endeavor to achieve a truly fit and proper sentence in any particular case. This has, and continues to be, the fundamental duty of a sentencing judge. *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.

- [21] What I take from those cases is the importance of acknowledging and recognizing within the process of sentencing that Aboriginal Peoples, generally speaking, are more strongly influenced by their association to their community and heritage than other groups. That is both positive in that it can be a defining characteristic of many Aboriginal cultures and negative in the sense that it has exposed Aboriginal people to discriminatory treatment by the government and society at large solely because of that heritage.
- [22] To reduce the principles to a simple logic, as I understand them, a court sentencing a specific Aboriginal offender must consider the following. If an appropriate sentence for someone with similar characteristics who committed the same crime in similar circumstances requires a period of incarceration to meet the goals of sentencing, this Court must consider if those same goals would be achieved to the same degree and effect by a different sentence, including possibly a lesser period of incarceration, in light of both the Aboriginal offender before the Court and the impact generally of the tragic historical mistreatment of Aboriginal Peoples. In other words, courts should carefully consider whether imposing the same sentence in the circumstances is actually disproportionate (in that it could be too harsh) in light of the unique circumstances of Canada's Aboriginal Peoples. I keep these principles in mind in considering the appropriate sentence in this case.

#### IV. WHAT IS A FIT SENTENCE FOR THE CONVICTION UNDER S. 151 OF THE CODE?

- [23] In deciding a fit sentence, the Court looks at the circumstances of the offence, the impact of the offence, the circumstances of the offender, the gravity of the offence, aggravating and mitigating factors and prior, relevant case law.

##### A. The Circumstances of the Offence

- [24] The circumstances of the offence are fully set out in *R. v. B.S.*, 2016 BCSC 2468. By way of brief summary, B.S. was found guilty pursuant to s. 151 of the Code of touching, for a sexual purpose, K.J., over a period of three years. He frequently engaged in the following behaviour towards her: leaning in close trying to kiss her, grabbing her buttocks, trying to unbutton or unzip her pants, using his leg to hold her down, attempting to reach underneath her shirt, and on one occasion rubbing against the clothing over her genital area. K.J. was 13 when these incidents began.
- [25] These incidents all occurred in K.J.'s home where B.S. visited as frequently as weekly. K.J. lives with her grandmother, who is B.S.'s aunt. K.J. was either alone in her bedroom or in the living room when B.S. would do those things. Sometimes someone else was in the house, but on a different floor and at other times she was alone in the house. Because B.S. and K.J. are within the same extended family, B.S. did not need to give notice or seek permission to visit K.J.'s home.

##### B. The Impact of the Offence

- [26] B.S. acknowledged at the sentencing hearing that he harmed K.J. by his actions. His counsel admitted that the impact on K.J. was serious and potentially life-long. Both Crown and defence counsel acknowledged the impact on young persons of inappropriate sexual touching is psychologically traumatic.
- [27] K.J. was only 13 to 16 when these offences occurred. During her testimony, she said the offences made her feel uncomfortable and awkward and gave her general stress and anxiety. She was fearful of his unexpected visits, which were frequent.
- [28] B.S.'s conviction itself has created disruption in the offender and K.J.'s extended family. In the presentence report, the author spoke with K.J.'s sister who stated that some family members are upset that the RCMP became involved and that these offences were dealt with outside the family. The result of that discord was that K.J. lost the support of and contact with some family members. This is consistent with evidence I heard during the trial. This represents further suffering that the offender's crimes inflicted upon K.J.
- [29] When the B.S. addressed the Court directly, he referred to the rift created in his extended family. Four members of that extended family attended the sentencing hearing in his support and two members of the community wrote letters on his behalf.

### C. Circumstances of the Offender

- [30] B.S. currently lives in a small remote community and has done so for most of his life. He was raised by his maternal grandmother. His mother essentially abandoned him and he has been estranged from her. The author of the Gladue report noted that his mother's abandonment may have had a negative psychological impact on him, which he has not yet addressed or acknowledged. Apparently, she is a heavy drinker. He never knew his father and B.S. believes he may be deceased. His father has been missing since 2006.
- [31] The offender has a strong link to his cultural heritage as a member of his Aboriginal band, the Tyee First Nation, one of the Wet'suwet'en First Nations. In fact, he spoke only his traditional language until he went to school. He reports being bullied at school for being Aboriginal, and receiving a strap for speaking his own language. Notwithstanding that, he did eventually graduate and he finished a two year Territorial Management Program, as well as becoming certified as heavy equipment operator. At one time he worked for the Band, and also a forestry company. Up until his conviction, he had a good record of steady employment, most recently working for the Band. Apparently he lost that job when he was convicted.
- [32] He described his grandmother as strict and hardworking and he felt lucky to have a good upbringing, especially compared to others in his community. He was required to come home straight after school to do chores and then partake in traditional activities including hunting, trap-lining, and picking berries. However, he and his grandmother lived in a rural area and he was isolated from and missed out on social interaction with his peers.
- [33] His grandmother forbade the excessive consumption of alcohol and he has never consumed drugs or alcohol. He lost members of his extended family because of violence fueled by addictions to drug or alcohol.
- [34] He has been a contributing member of his community, assisting elders. Specifically, he is providing important daily assistance to an uncle. Among other things, he ensures his uncle takes his medications.
- [35] After submissions were completed, B.S. sought leave for two letters written in support of him to be entered into evidence even though they were submitted late. Crown did not object to the admission into evidence of the letters, but did object to some of the content, to which defence counsel agreed I should ignore. I disabused my mind of content that was not addressed to the character, personality, or circumstances of the offender. The admissible content was consistent with both the presentence report and the Gladue report, noting that B.S. has always been shy and withdrawn and was raised in a traditional manner by his grandmother.

- [36] B.S. took the opportunity to address the Court at the end of counsel's submissions. He apologized and expressed shame for his wrongdoing. He expressed remorse for the grief his actions have caused by creating a rift within the extended family. He stated he was willing to do whatever was necessary to address his wrongdoing. That remorse was also reflected in the Gladue report.
- [37] This expression of remorse may be significant. In the presentence report, B.S. denied he did anything illegal and alleged that K.J. fabricated the offences. He also believed she suffered no harm. That attitude would clearly be an aggravating factor in his sentencing. Crown's position is that, despite his recent expression of remorse, I should take into account that his denial was only reversed over a year after his conviction. As noted in the presentence report, his denial and attitude make him ineligible to participate in a community-based restorative justice initiative (discussed below).
- [38] B.S. is a member of the Tyee First Nation. The Band is part of the Wet'suwet'en First Nation located near Burns Lake. The community is accessible by road and a ferry across a lake. The author of the Gladue Report addressed the unique background of members of that community as follows:

The impacts of colonization and residential schools are still impacting the community. There are many families that are direct survivors of the residential school system and the foster care system. The nearest residential school was Lejac, located near the town site of Fort Fraser Lake, which operated from 1917 to 1976, when it was closed. Although [B.S.'s] grandmother and others in the community have been able to maintain many of the traditional cultural practices and beliefs, their community, like many others, has suffered from the impacts of colonialism, including displacement, Indian residential school, foster care, substance abuse, poverty, violence and sexual abuse. There are high rates of death and violence in the community. [J.S.] reports that their community has high rates of sexual abuse which is often underreported; she stated that this 'condones the behaviour and teaches young men that it is okay'.

- [39] B.S.'s family was not immune from these effects. Members of his extended family have struggled with addictions to alcohol and drugs and he has lost many family members to overdoses or other violent deaths. He attributes his ability to largely escape those tragic consequences to his grandmother's firm guidance and education.
- [40] The author of the Gladue report also refers to statements made by J.S., his cousin and member of the same band, who commented on the impact of two particular events (uncles being shot at close range while they were passed out). J.S. stated those events were "devastating in the community because the tragic deaths were often at the hands of a relative or friends", and that "would cause a rift within the community because people would have to choose sides".

- [41] The author of the Gladue report also provided a comment about the incidence of sexual assaults in the community. The author repeated a comment from a member of the community that the community has high rates of sexual abuse, often unreported and that situation "condones the behaviour and teaches young men that it is okay".

#### D. Gravity of the Offence

- [42] There is no question that sexual offences against children are extremely serious. The seriousness and gravity of these offenses has been expressed by Parliament, in part, by placing mandatory minimums on these offenses. It is also true that sentences relating to the sexual abuse of children have continued to lengthen as first noted in *R. v. Tom*, [1991] B.C.J. 2617 (C.A.); see also *R. v. Rich*, 2014 BCCA 24 at para. 18 and *R. v. K.R.J.*, 2014 BCCA 382 at paras. 32-33.
- [43] The Crown has emphasized this factor. Crown counsel suggests that looking at the character of the offender's actions as part of considering the gravity of the offence to determine proportionality means only looking at the offence generally rather than the particular circumstances that underlie the offender's conviction. That proposition is consistent with the case law as I understand it.
- [44] There is no doubt that children who have been interfered with in a sexual manner will experience trauma and the devastating effects for a long time. However, I will be remiss if I did not mention that there is at least some indication that, thankfully, K.J. is beginning to cope with her experiences. The presentence report notes that she has more recently come out of her shell and at times is happy. This in no way diminishes the gravity of the offence, but it is a piece of evidence that I am obliged to take into account.

#### E. Aggravating and Mitigating Factors

- [45] The Crown submits that the persistent, pre-meditated and multiyear nature of the offenses are aggravating factors.
- [46] Crown counsel submits that although the nature of the touching that occurred was towards the less serious end of the spectrum (because there was no direct skin contact), the frequent and persistent nature of the touching makes these offenses more serious. In particular, Crown counsel refers to K.J.'s testimony, which I accepted, that B.S. would abuse her, "every chance he got". I agree that the number of incidents does move this offence more toward the serious end even though the touching that occurred would not be considered the most severe.

- [47] However, I do not agree with Crown that the offenses were premeditated. Crown asked me to infer there was premeditation because of a combination of his communication and frequency that he visited the home. However, the evidence was mixed on that issue. In at least one incident described by K.J. (see paragraph 74 in conviction judgment), B.S. demonstrated hesitancy because when he walked into the house, he did not expect to find K.J. there alone and initially he left.
- [48] Also, I accept that B.S. visited the house because his aunt (the child's grandmother) spoke the traditional language and that was important to both of them. Therefore, he did have a reasonable and important reason to visit the home independent of K.J.'s presence. Accordingly, I am not satisfied that the Crown has proven the offences were premeditated in a manner to constitute an aggravating circumstance.
- [49] B.S. is over 25 years older than K.J. and was described by her as being her cousin. Crown counsel submits that factor was significant. The familial relationship meant B.S. was trusted and free to attend at the residence at any time he wanted. This naturally increased the anxiety for K.J. and so I agree that was an aggravating factor.
- [50] Crown also submits his initial denial of responsibility for committing the offences is aggravating. Crown counsel submits I should not place much weight on his remorse because it was recent.
- [51] I view the matter somewhat differently. The offender's acceptance of his crime and expressions of remorse and shame, even though they came late, do indicate some capacity for rehabilitation. Although it was not stated explicitly, I think it reasonable to infer that his connection to and reliance on his family members played some role in his change in attitude. I find this demonstrates the possibility of the positive and moderating influence his connection to his family and cultural heritage may have on his behaviour. Although, that does not completely eliminate the aggravating effect of his initial denial, it does temper it a bit. I find on the whole, however, his requiring K.J. to go through the ordeal of a trial, and the special accusation that she was deliberately lying does negate a large portion of the mitigating impact of his expression of remorse.
- [52] Crown counsel also suggested the expression of remorse was not accompanied by any attempt to engage in counselling or arrange for the potlatch as B.S. submits would be an appropriate part of a conditional sentence. However, as pointed out by defence counsel, the latter was not available to him because there is a no-contact order in place. I also note that counselling services available in the community were sparse.
- [53] Although the delay in B.S.'s acceptance of his culpability is concerning, I find the fact that he did express remorse and shame, even though late, does temper to at least some degree the aggravating effect of the delay.

- [54] B.S. does not have a prior criminal record and has also not violated any of his release provisions. Both are mitigating factors. He has also been steadily and productively employed for his entire adult life. This too is a mitigating factor.

## F. The Gladue and Pre-sentence Reports

- [55] I find that B.S.'s Aboriginal heritage is central to who he is as a person. As noted earlier in this judgment, he has been raised in his traditional culture, his first language was his native tongue and he has been involved in his community throughout his life.
- [56] The Gladue report states that the hereditary Chief and Leader of the Frog Clan have expressed a desire to support B.S. in the community, and specifically referred to and explained the Potlach system, which is "a traditional form of governance and law making". A Potlatch is a "feast hosted by a person who has harmed another person of the community". The community assists by raising funds and during the ceremony "gifts of food and money are offered to those harmed to repair the harm caused". The author of the Gladue report stated that the members of the community are trying to repair the intergenerational effects of the residential school system and foster care by reinstituting these types of cultural and traditional ceremonies.
- [57] The Gladue report also identifies that a combination of therapy provided at the local health centre combined with the traditional practices is an option for B.S. The PSR refers to the Wet'suwet'en Unlocking Aboriginal Justice Program established in 1992. The program is described in that report:

The Unlocking Aboriginal Justice programs were designed to facilitate processes between the House Groups and the offenders. Through these processes, action plans are developed. These plans include rehabilitation, restitution and attempts to create balance and harmony between the clients, the communities, and the victims, if any were involved. When such plans of action are created, they are signed by the house chiefs, the offenders, the victims, and the Unlocking Aboriginal Justice facilitators. In order to participate in these programs, the offenders must take responsibility for their actions and if there are victims, they must agree to the offender participating in the program.

- [58] When the presentence report was written, the program described above was not as option because B.S. did not accept responsibility for his actions. The pre-sentence report also refers to the availability in Prince George of forensic psychiatric services should a community supervision order be imposed. However, Prince George is not close to the offender's community.
- [59] The author of the presentence report also indicated that if a sentence of greater than two years was given, the offender "would likely be sent to Mountain Institution", a medium security facility located 120 kilometres east of Vancouver. A sex offender program is available there. However, the author also noted that access to the program is prioritized based on offenders' previous history of violence, their risk rating, and the release date. This

suggests to me that B.S. would not necessarily have a high chance of being assigned to that program.

- [60] Counsel also referred to the Ford Mountain Correctional Centre in Chilliwack which accommodates provincially-sentenced inmates convicted of sexual offences. However, there has historically been a waitlist for the program and it is only offered four times a year lasting three months. Accordingly, it is generally unavailable unless there is at least a 12-month sentence.

### G. Prior, Relevant Case Law

- [61] Direct comparisons between cases are always difficult because each case involves entirely different facts. There is also something unseemly about an analysis that focuses on which type of sexual interference is "worse" than another. However, a fundamental feature of sentencing is that sentences "should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".
- [62] The Crown referred to a number of other cases where the nature of the offences committed shared some features with the case before me, two of which I find helpful. In *R. v. Lonegren*, 2009 BCSC 1678, the 51 year-old offender was convicted of sexual interference with a nine-year-old girl. The offender entered the girl's room at night, rubbed her back with his hand underneath her tank top while she pretended to be asleep. He then moved his hands down her back, underneath her buttocks. She rolled over giving the impression that she was waking up and the touching stopped. It only lasted a few seconds. At that time, the minimum sentence was 45 days. Justice Barrow dismissed a constitutional challenge to that minimum and sentenced the offender to the minimum of 45 days.
- [63] In *R. v. T.M.B.*, 2011 ONCJ 528, the 53 year-old offender was the grandfather of the five year-old child. They had both removed their pants and underwear while lying on the floor and there was contact between their genitals. The offender was sentenced to a 90-day sentence.
- [64] While the nature of the touching in both cases is not at the most severe end of the spectrum, which has a similarity to the facts of this case, those cases were single incidents whereas the offences in this case were frequent over a three-year period.
- [65] In some cases, the nature of the touching was more egregious, but may not have had the same frequency of incidents over the same period of time:
- a) The offender in *R. v. J.M.*, 2012 BCPC 530, received a 90-day intermittent sentence and three years probation. The offender was the eight year-old child's father, the incidents occurred over a period of one month and there were three to five incidents of the offender touching the child's vagina.

- b) In *R. v. J.H.*, 2014 BCSC 2028, the offender was sentenced to nine months' imprisonment and two years' probation in circumstances where there was one incident, but the touching was more serious. I find the case is unhelpful, however, because the assault was motivated by the offender's desire to involve the police in a civil dispute he had with the child's stepfather.
- c) The underlying facts in *R. v. E.M.Q.*, 2015 BCSC 201, have some similarities to this case, although that involved only one incident. The offender and the complainant were known to each other. The complainant was 14 years-old and was babysitting the offender's daughter. When the offender and his girlfriend returned from a party, they put their child to bed and went to sleep. Later that night, however, the offender approached the complainant and asked to kiss her. When she refused he wrestled with her, leaned into her and attempted to touch her breasts and vagina. She resisted, but the offender succeeded in touching her clothing in the area above her pelvic area. The incident came to an end when the offender's girlfriend heard the disturbance and came into the living room. The offender was an Aboriginal person and had a prior criminal record. After dismissing a constitutional challenge to the mandatory minimum sentence, Justice Pearlman sentenced the offender to 13 months followed by two years' probation. However, in addition to the sexual interference charge, the offender had breached a condition that he have no contact with his girlfriend.
- d) In *R. v. G.M.*, 2015 BCSC 2224, the accused pled guilty to sexual interference. The complainant was the offender's grandniece and he tickled and teased her and then placed his hand under her shirt touching her bare breasts. He followed her into another room and repeated this, and eventually put his hands into her pants and made contact with her buttocks and then lifted her shirt over her head. The offender was sentenced to six months incarceration with 18 months probation.
- [66] B.S. relies on the decision in *Scofield* because the sexual character of the offences was more extreme, yet a conditional sentence was imposed. In that case, the offender was 22 years-old at the time of the offence and engaged in sexual activities with two different 15 year-old girls over a period of six months. The activities included intercourse, oral sex and masturbation and he engaged in that conduct at least three times with each girl. The offender had cognitive impairments and dysfunction. He received a conditional sentence.
- [67] Crown also referred me to cases from other jurisdictions where Aboriginal offenders were imprisoned for convictions for sexual interference: *R v Doll*, 2014 NWTCA 3, where the Court lowered a sentence imposed at the trial level to 22 months, *R v S.J.P.*, 2016 NSPC 50, where the Court imposed a five month sentence, and *R v Springchief*, 2017 ABPC 134 which imposed a 12 month sentence.
- [68] In *R. v Hood*, 2016 NSPC 78, an offender convicted of two counts of luring and one count of sexual interference was sentenced to a combined total of 15 months' conditional sentence; the sentence was upheld on appeal: 2018 NSCA 18. I find the circumstances of that case to be very different because the Court emphasized that the offender, who was diagnosed as being bipolar, was in the grip of a manic episode at the time of the offences.

[69] The Supreme Court of Canada upheld (on an equal division) the Newfoundland Court of Appeal's dismissal of a 22 month conditional sentence imposed for convictions of indecent assault and gross indecency: *R. v. L.F.W.*, 2000 SCC 6. That case involved historical sexual abuse of a 6 to 12 year old by the offender who was in his 20s at the time of the offences. The gravamen of the decision of the 4 judges who upheld the Court of Appeal was the importance of deference to sentencing judges. They also commented on the sentencing judge's specific consideration of how the offender would fulfill obligations aimed at restorative objectives (para. 23).

## H. ANALYSIS

- [70] As discussed earlier in this judgment, I follow the declaration made in *Scofield* that the mandatory minimum passed by Parliament is of no force and effect. Accordingly, a conviction under s. 151 of the Code has a potential maximum imprisonment currently at 14 years (at the time of the offenses it was 10) and no minimum.
- [71] Crown suggested the range that would be appropriate is between 24 to 30 months. Defence counsel relied heavily on *Scofield* and said that a conditional sentence is appropriate. Defence counsel also pointed out that the nature of the sexual interference in *Scofield* was extreme because it included intercourse and yet a conditional sentence was still found to be appropriate. Defence counsel emphasized that a conditional sentence would be compatible with B.S. engaging in restorative justice within his community keeping with his Aboriginal heritage.
- [72] I do not agree with the Crown that the case law presented fairly establishes a range between 24 to 30 months. Instead, I find the range for cases where the nature of the sexual touching was not as invasive is between 90 days and 24 months. However, the frequency and the number of incidents in this case, push B.S.'s crimes to the higher end of that range.
- [73] Cases at the lower end of that range typically involved a single incident. B.S.'s offences here are more serious because of the length of time over which they occurred and how frequently K.J. was subjected to the criminal behaviour. The offender was also in a position of trust with K.J. Those factors are significant and elevate his moral blameworthiness. Also he had easy and unfettered access to K.J. at her home because of his relationship with her grandmother thus cloaking his attendance at the home with propriety.
- [74] The author of the Gladue report and defence counsel refer to the importance of considering restorative justice options and counsel recommended a conditional sentence to allow the offender to perform a potlatch. I appreciate and recognize that such an event could be in keeping with sentencing principles, especially addressing the principles of restoration and taking responsibility.

- [75] However, defence counsel did not explain how the proposed conditional sentence would also address deterrence and denunciation. That is significant given the reference in the Gladue report to the high incidence of sexual assault in that community and the message apparently conveyed to young men that such behaviour is condoned. The offender offered no submissions on how what he proposed would achieve those two extremely important goals of sentencing.
- [76] Also, neither counsel nor the Gladue report author provided any detail or indicated any inquiries that have been made about the availability or timing of performing the potlatch, or any other traditional ceremonies. Basically, there was no plan presented to the Court. The only references to other restorative justice initiatives, or counselling, was in the presentence report. The counselling seemed onerous because it is in Prince George.
- [77] Most importantly, I was given no information that any inquiry had been made on behalf of the offender about K.J.'s or her family's reaction to the restorative justice initiative suggested. As described in the presentence report, her participation is a necessity, as I understand it. Thus, I am not assured that imposing a conditional sentence would permit the proposed restorative justice initiative to take place. Given the significant rift within their extended family to which both K.J. and B.S. referred, I would need some assurance that K.J.'s family would participate in a restorative justice initiative. Without that information, there looms the possibility that imposing a conditional sentence on a promise of such initiatives being undertaken in order to help rehabilitation and offer restoration in keeping with the Aboriginal heritage would not ever happen.
- [78] I note that B.S. has been fortunate on a personal level to escape the abuse and addiction problems that have been recognized to be part of the negative and harmful legacy imposed on Aboriginal people because of colonialism. I agree that does not mean he has been immune to those influences. His grandmother was probably able to raise him in the traditions of his culture based, at least in part, on their isolation. That is an apt illustration of the awful legacy of the harms inflicted on Aboriginal people and cultures; he could only be raised within his traditional culture by being separated from the majority of his community, which of course is counterproductive to a culture based largely on communal principles.
- [79] However, I do not agree that proportionality can be achieved with a conditional sentence, even when emphasizing the importance of his heritage and the Gladue factors. The offences occurred over a long period of time starting when the victim was merely 13 years old. She considered the offender part of her extended family. The incidents were frequent. They occurred in her home. There is no question that the B.S. knew she was under 16 years of age. While he was unsuccessful at having direct intimate contact with her, he clearly tried to on many, many occasions. This type of behaviour was predatory and constant.
- [80] For all those reasons and having specific regard to the ties to his community, I find a sentence of 12 months' incarceration, and two years' probation is appropriate.

## V. DOES THE MANDATORY MINIMUM SENTENCE FOR S. 172.1(1) VIOLATE THE CHARTER?

- [81] B.S. was also convicted of communicating with K.J. for the purpose of facilitating the touching of K.J. for a sexual purpose contrary to s. 172.1(1) of the Code. The Crown seeks a sentence of 12 to 15 months. B.S. submits the conditional sentence of two years less a day, concurrent with his conviction under s. 151 is a fit sentence. However, B.S. also raises a constitutional challenge to the mandatory minimum under s. 172.1(1) of the Code.
- [82] In *R. v. Nur*, Chief Justice McLachlin set out the issues that arise when a mandatory minimum sentence is alleged to violate s. 12 of the Charter. There are two steps (para. 46). The court first determines the appropriate sentence for the offender based on the standard approach as discussed earlier in my reasons (see above, paras. 14-22). Secondly, the court asks whether the mandatory minimum is grossly disproportionate to what was found to be a fit and proportionate sentence for the offender.
- [83] Grossly disproportionate is something more than "excessive"; it must be "so excessive that it outrages the standards of decency" in a way that Canadians "would find the punishment abhorrent or intolerable": *R. v. Ferguson*, 2008 SCC 6 at para. 14. If it is, the Charter breach has been established and the onus falls on the Crown to justify it under s. 1 of the Charter.
- [84] If, however, the minimum sentence is not grossly disproportionate to the one determined by the sentencing judge to be fit and proper, the Court must consider whether there are "reasonable hypothetical circumstances" identified by the offender which would result in a grossly disproportionate sentence: *Nur*, at paras. 56-58. Such examples cannot be far-fetched, marginally imaginable, remote or extreme. If they are, then the mandatory minimum would violate s. 12 of the Charter.
- [85] The constitutional validity of this section was recently argued at the Supreme Court of Canada on an appeal from *R. v. Morrison*, 2017 ONCA 582. The offender posted an online ad and communicated with whom he believed was a 14-year-old girl, but was, in fact, an undercover police officer. The communication included explicit sexual content. Mr. Morrison argued the mandatory minimum of one-year imprisonment infringed his rights under s. 12 of the Charter and the trial judge agreed.
- [86] The Court of Appeal dismissed the appeal. The Court held that the offender was culpable only for having acted unreasonably in failing to take steps to ensure the person was not under age. His communication persisted for two months, but there was never a face-to-face encounter and the trial judge found that there was no indication that the offender intended to commit a physical offence in relation to the child. He eventually ended his communications unilaterally. The offender had no criminal record and no actual harm resulted from his behaviour.
- [87] Absent the mandatory minimum, the trial judge found the appropriate sentence would have been 75 days' intermittent imprisonment with a one-year probation and 20-year Sex Offender Information Registration, and that sentence was upheld by the Court of Appeal.

[88] The Court of Appeal of Ontario is not binding on me, but the decision is helpful and I have found the reasons to be persuasive.

A. What is a fit sentence for B.S.'s conviction under 172.1(1) of the Code?

[89] I repeat and adopt my discussion earlier in this judgment regarding the impact of the offence, the circumstances of the offender, the aggravating and mitigating factors and the Gladue and PSR reports. In addition, the following factors are relevant.

[90] The circumstances of the offence are described at paras. 89 to 109 of 2016 BCSC 2468. To summarize those circumstances, B.S. sent approximately 100 text messages to K.J. over about a four month period. He also messaged her on an application called "Kik" and Facebook. In his text messages, he frequently referred to her as "babe", referred to her "butt" twice and asked if she would visit him. At least two times he texted: "wat ya cute butt up to?", and once he texted: "wat u monkey ass up to. Lol". The notable thing about the messages is their lopsided nature; K.J. rarely responded to B.S. yet he persisted in texting her, sometimes several times a day.

1. The Gravity of the Offence

[91] Crown submits that the content of the communication that constituted the offence is irrelevant to the length of the sentence imposed, relying on the legal principles discussed at paras. 86 and 87 of 2016 BCSC 2468. The content of the communication need not be explicit nor capable of facilitating the commission of a secondary offence to support a conviction under s. 172.1(1) of the Code. Part of the reason is that in cases of luring, or "grooming", offenders often can take their time to manipulate the complainant into feeling comfortable and as that happens, the communication typically moves towards becoming sexually explicit. Ultimately, the offender arranges to meet the complainant in order to sexually assault her. Thus, the more explicit the communication, the closer the offender has become to reaching his goal of committing the offence of sexual assault and/or touching. Thus, the purpose of the communication remains the same regardless of the stage of progression it reaches.

[92] However, I do not agree the content is irrelevant when considering the gravity of the offence for the purpose of sentencing. Just as the gravity of sexual assaults are placed on a spectrum from most egregious to lesser degrees of severity, the same can be true of communication. It is true that in cases of "grooming", an offender may spend a long time getting the victim to feel comfortable by including no explicit or implicit sexual connotation in the communication as a precursor to introducing those elements. There is a progression to the luring behaviour. In my view, it is appropriate to take into account at what stage the offender progressed in his luring in deciding the appropriate sentence, in part, because the impact on the victim was probably different.

[93] In this case, the nature of the communication was at the lower end of the spectrum. There was no explicit or implicit sexual content, nor any invitation to sexual or intimate touching. However, the lopsided nature, the persistence, and the continual desire to have K.J. come to his house do raise the gravity from the lowest level.

## 2. Precedents

[94] In *R. v. Reynard*, 2015 BCCA 455, the offender pled guilty to child pornography offences and a count of luring. He was sentenced to one year in prison for the luring consecutive to the sentence for the child pornography charges. The Court of Appeal upheld the sentencing judge who found a range of 12 months to two years was appropriate for the luring. The offence was more serious in that case because the communication was sexually explicit. The offender sent a video encouraging the complainant to engage in sexual behaviour.

[95] In *R. v. Aimee*, 2010 BCSC 1463, the offender was convicted of two counts each of sexual luring, interference and luring. The communication lasted several weeks and it became sexually explicit. He was sentenced to 16 months' concurrent for each of the luring counts. The sentencing judge found the interference and luring were separate and distinct offences and should attract consecutive sentences, however, when applying the totality principle, she made them concurrent.

[96] In *R. v. B. and M.S.*, 2014 BCPC 94, one offender was sentenced to 90 days to be served by way of a conditional sentence and 18 months' probation for exchanging explicitly sexual conversation and photographs over social media with the complainant who was 13 or 14.

[97] In *R. v. Vergara-Olaya*, 2016 MBQB 130, the accused was convicted of sexual interference and luring of a 13-year-old. The offender was a family friend who took advantage of his relationship with the complainant's mother. The offender had touched the complainant's breast and also arranged a meeting with her through Internet conversations. While there was only one incident, the Court in that case found it was not a spontaneous spur-of-the-moment assault; it was deliberate and planned as evidenced by the communication that led to a conviction on luring. The sentencing judge found that the offender was attempting to psychologically manipulate the child. The offender had no previous criminal record and the incident was not violent. The sentence was two years less a day for sexual interference and one year for luring served concurrently.

[98] In *R. v. Craig*, 2013 BCSC 2098, the offender was 22 years old and the victim 13. He was sentenced to 15 months' incarceration. In that case, the offender contacted the complainant through a social media site, arranged to meet her, and gave her alcohol, and then at the next meeting, he assaulted her.

[99] In *R. v. Miller*, 2016 SKCA 32, the offender was 19 and the victim was 13. He was convicted of sexual assault and luring. The offender communicated with the complainant via social media for about six months, after which he assaulted her. The offender pursued a sexual relationship in their communication on social media. The trial judge found that the

relationship that the offender pursued was planned and deliberate, which was an aggravating factor. The trial judge found the offender's relative youth, lack of criminal record, emotional immaturity due to spina bifida, his supportive family, and his reasonable prospects for rehabilitation to be mitigating factors. The judge ordered a sentence of 14 months' imprisonment for the sexual assault and nine months' concurrent for the luring. On appeal, the Court found that the trial judge failed to take into account the offence of luring as a discrete and separate offence from the sexual assault and allowed the Crown's appeal imposing a global sentence of three years' imprisonment.

- [100] I was referred to some cases where the Court considered whether a conditional sentence was appropriate for luring (usually in combination with possession of child pornography, or sexual interference). In *R. v Gurr*, 2007 BCSC 1586, Mr. Justice R.E. Powers provides an overview of decisions that addressed conditional sentences for sexual offences (paras 8-27). However, on the facts before him, he rejected the imposition of a conditional sentence for child pornography possession and luring convictions (paras 26-27).
- [101] More generally, in *R. v. Paradee*, 2013 ABCA 41, the Court of Appeal of Alberta rejected as overly lenient both the imposition of a non-custodial sentence for luring as well as a 90-day intermittent sentence for possession of child pornography. The Court referred to the need for a custodial sentence when the conduct was planned, deliberate, and long-term (para. 19).
- [102] The Crown seeks 13 to 15 months to be served consecutively whereas the offender submits a conditional sentence of two years less a day is appropriate.

### 3. Analysis

- [103] I do not agree with Crown on the appropriate range. Although the offender's communication was persistent and largely unreciprocated, it did not escalate in terms of content. It never contained explicit sexual content, nor innuendo. There was no progression.
- [104] However, the lack of escalation must be viewed in combination with the fact that B.S. had easy and frequent access to K.J.'s home. That factor makes the persistence of his communication more serious. He was also continually inviting her to his house. He was warned off communication with K.J. by her brother, yet he apparently switched platforms and continued. He acknowledged at that time that his communication was inappropriate. These factors do elevate his moral blameworthiness.
- [105] The severity of the offence is towards the lower end, but that is countered by the ease and frequency that he had access to K.J.'s home. The combined impact of those facts made what might have been described as innocuous communication more harmful. The appropriate range for this type of communication is between 90 days and one year.

[106] Taking into account all the factors, including my discussion earlier about the offender's Aboriginal heritage, I find a sentence of incarceration of six months is appropriate. The communication in this case was neither implicitly or explicitly sexual, but it was persistent and lopsided.

B. Is the mandatory minimum sentence grossly disproportionate to the fit and proportionate sentence for B.S.?

[107] The issue is whether a one year mandatory minimum sentence is grossly disproportionate to what I have found to be the fit sentence for B.S.'s conviction under s. 172.1.

[108] The mandatory minimum is double what I have found to be fit and I do find that to be grossly disproportionate. Viewed in isolation of the conviction under s. 151, sending a person to jail for 12 months when the communication was not explicit or implicit -- and there was no implicit sexual content -- is harsh. I also consider that the attempt to lure K.J. to his house was never successful. Thus, looking at that offence alone, I conclude that the one-year prison sentence as a mandatory minimum offends the standards of decency.

[109] Even if I am wrong about that, however, I find the facts as presented in Morrison constitute a hypothetical situation that illustrates the mandatory minimum would be grossly disproportionate.

[110] It is my understanding that Crown requested, and there was no objection, that my conclusion that the mandatory minimum sentence offended the Charter meant a further hearing is required to determine if Crown can justify the violation under s. 1 of the Charter. Given the result in Scofield, it seems to me that hearing ought to be restricted to the s.1 defence on luring. Thus, that hearing must be scheduled.

[111] It is not clear to me if the continuation of a hearing for the appropriate sentence on luring means that no sentence can be imposed today at all, or if the sentence for conviction s. 151 can be imposed.

[112] MS. VIZSOLYI: -- yes. Yes, I do need to ask Your Ladyship to allow the Crown to make submissions on s. 1 and I do need some time to do that. I anticipate, however, that I can do that in writing without need for a separate court hearing for oral submissions in respect of that and I expect that Mr. Jones will not have an issue with that, but I will need a little bit of time.

[113] THE COURT: Mr. Jones, what do you say about that? So, Crown is suggesting that the submissions on s. 1 of the Charter would be done without an oral hearing.

[114] MR. JONES: So long as I get an opportunity to reply.

[115] MS. VIZSOLYI: Of course.

[116] THE COURT: Yes, of course.

[117] MR. JONES: Yes.

[118] THE COURT: But, Ms. Vizsolyi, and it may be that your colleague needs to answer this, and I apologize for the perhaps simplicity of the question, but do I now pronounce finally the sentence on 151 or is that, too, adjourned?

[119] MS. VIZSOLYI: You have caught me a little bit here, My Lady. I think that you could --

[120] MR. JONES: Yes.

[121] MS. VIZSOLYI: -- pronounce the sentence. I am not sure that it is the best practice here.

[122] THE COURT: Mr. Jones.

[123] MR. JONES: Well, I agree with my friend that it is -- that you could pronounce the sentence on the -- there is no issue with respect to that at this point. So, unfortunately, in almost 40 years I have never encountered this kind of situation before, so.

[124] THE COURT: Well, I am glad it is not just me then.

[125] MR. JONES: Yes.

[126] THE COURT: It is an unusual situation.

[SUBMISSIONS RE FINAL PRONOUNCEMENT OF SENTENCE]

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RECONVENED)

[127] THE COURT: Thank you. All right. I will return to pronounce sentence at the future hearing. Given that defence counsel and his client are aware that there will be a custodial sentence imposed for the conviction under s. 151, and at the invitation and with the consent of both Crown counsel and defence counsel, I am revoking B.S.'s bail and I am remanding him in custody for the imposition of sentence to be at a later date. I do not recall and I am not aware of what his bail conditions were, but I assume I do not need to make reference to them if I am simply revoking them.

[128] MS. VIZSOLYI: That is correct, My Lady.

[129] MR. JONES: I do not know if my friend needs an s. 516 order at this point.

[130] MS. VIZSOLYI: I guess out of an abundance of caution we should have one, that he should not have contact with K.J. under 516 --

[131] THE COURT: All right.

[132] MS. VIZSOLYI: -- sub (2), is it, I think?

[133] MR. JONES: I believe so.

[134] THE COURT: All right. So, and I assume that is a continuation, but in any event, there is an order under what counsel informs me is s. 516(2), of the no-contact order with K.J.

"Sharma J."

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