
CANADA / JUDGMENT

R. v. C.A.B.

2021 BCSC 2107

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2021 BCSC 2107 R. v. C.B.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

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2021 BCSC 2107

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Registry: Kamloops

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v.

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Before: The Honourable Madam Justice Lyster

On appeal from: An order of the Provincial Court of British Columbia, dated May 25, 2020 (R. v. C.B.A., Lillooet 104934).

Reasons for Judgment

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Place and Date of Trial/Hearing:

Kamloops, B.C.

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Table of Contents

Introduction. 3

Decision in Provincial Court. 4

Analysis. 6

Mootness. 6

Standard of Review. 7

The Test Under s. 12 of the Charter 7

The Court of Appeal's Decision in Scofield. 9

Sentencing for Child Sexual Offences in Light of Friesen. 12

Is the Minimum Mandatory Sentence in s. 151(b) Contrary to s. 12 of the Charter?. 16

Conclusion. 21

Introduction

- [1] The appellant appeals from the order of the Honourable Judge S.D. Frame of the Provincial Court of British Columbia, pronounced May 25, 2020. The appellant was sentenced to five months in jail. On June 12, 2019, Judge Frame had convicted the appellant on one count of sexual interference contrary to s. 151(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code].

- [2] The findings of fact included that the appellant had touched the vagina of the complainant inside her shorts as she squirmed awake and that when fully awake the incident ended and the appellant left the room. At the time of the offence, the complainant was 15 years old, and the appellant was in his late 20s. They were related "as a cousin of some sort". Both are Indigenous.
- [3] The sole issue in this appeal is whether the 90-day minimum mandatory sentence which applies when the Crown proceeds by summary conviction under s. 151(b) of the Code for sexual interference constitutes cruel and unusual punishment contrary to s. 12 of the Canadian Charter of Rights and Freedoms s. 7, Part I of the Constitution Act, 1982, c. 11 [Charter]. The appellant does not argue that such a sentence is grossly disproportionate when considered in relation to a particularized inquiry of his individual circumstances. Rather, the question is whether a 90-day minimum mandatory sentence is grossly disproportionate in relation to a reasonable hypothetical offender. Central to this analysis is the decision of the Court of Appeal in *R. v. Scofield*, 2019 BCCA 3 [Scofield], which I will discuss at some length.
- [4] Judicial opinion, including in the Provincial Court of British Columbia, is divided on the question of whether the 90-day minimum mandatory sentence in s. 151(b) infringes s. 12 of the Charter. The parties ask this Court to decide this appeal, notwithstanding that it is moot, in large part due to the inconsistency in decisions on this issue emanating from the Provincial Court.

Decision in Provincial Court

- [5] Following the appellant's conviction, the matter was adjourned for a sentencing hearing. On November 19, 2019, the appellant filed a notice of a constitutional question seeking relief on the grounds that the 90-day mandatory minimum sentence under s. 151(b) was contrary to sections 7 and 12 of the Charter. By agreement, argument on the constitutional question was bifurcated, and proceeded only under s. 12.
- [6] Judge Frame issued her reasons for sentence on May 25, 2020: *R. v. C.B.A.*, 2020 BCPC 111. She found that a fit and appropriate sentence for the appellant would be a conditional sentence order ("CSO") of eight months, followed by a two-year probation order with strict punitive measures as well as rehabilitative ones. She further found that a 150-day sentence of incarceration was fit absent the option to impose a conditional sentence. In considering s. 12 of the Charter, Judge Frame wrote:
- [58] As I have said, counsel have already conceded that an eight month conditional sentence order is not grossly disproportionate to a 90 day mandatory minimum sentence. Although I would impose a 150 day jail sentence if a conditional sentence order were not available to me, it is not what I determine to be the fittest and most appropriate sentence in the circumstances. That is not the test.

- [59] Having found as I do that the conditional sentence order I would impose is a fitter sentence but not a grossly disproportionate one because I would impose a 150 day sentence absent that conditional sentence order option, I do not feel that it is entirely appropriate to embark on the s. 12 analysis. However, Mr. Carot has provided to me a recent decision of Judge McCarthy, R. v. C.G.J., 2020 BCPC 26.
- [7] It is helpful to summarize R. v. C.G.J., 2020 BCPC 26 [C.G.J.] at this point. The offender in C.G.J. was 18 years of age, and the victim was 13 years old. They were both Indigenous. The offender was diagnosed with Partial Fetal Alcohol Syndrome, which was found to have a causal connection to his offending behaviour. He was found guilty after a three-day trial. His conduct included holding the victim around the waist, kissing her on the lips, sticking his hand in her pants beneath her underwear and towards her vagina, and grabbing her buttocks. The victim repeatedly said "no" and was distraught.
- [8] Judge MacCarthy in C.G.J. held that a five-month CSO was a proportionate sentence. At para. 92, MacCarthy P.C.J. found that an intermittent sentence that would permit the offender to start and complete a Forensic Sex Offender Treatment Program would exceed the 90-day statutory limit of an intermittent sentence. At para. 102, MacCarthy P.C.J. determined that a 90-day sentence in custody would be grossly disproportionate on an individualized inquiry. He stated:

In my view, there is a significant difference for this particular young, immature Accused, with his unique circumstances and with his significant deficits, to serve his sentence in the community under a CSO, with the support of his family and his First Nations Community, and with an early opportunity to start and continue with his necessary sex offender treatment in the community, than to serve a "real jail sentence", with the exposure to the professionally identified risks for the Accused that have been raised by Dr. Down. I have reached this conclusion, notwithstanding that such a "real jail sentence" is only for the duration of the 90-day MMS.

- [9] In the event he was wrong, MacCarthy P.C.J. also considered whether such a sentence would be grossly disproportionate to the Scofield Close-in-Age Reasonable Hypothetical Offender, and, at paras. 106-108, determined that it would be. I will return to that hypothetical later in my reasons.
- [10] Returning to the sentencing decision under appeal, Judge Frame went on to consider the decision in C.G.J. Judge Frame declined to follow C.G.J. She held at para. 61:

I appreciate the principle of comity on our bench, but I am not bound by the decisions of my colleagues other than for this very important concept. In my view, even an intermittent jail sentence of 90 days would allow for a period of probation long enough to complete the critical rehabilitation component of sex offender treatment. I do not find that such a sentence would outrage the standards of decency of most Canadians.

- [11] Counsel for the appellant argued before Frame P.C.J. that a 90-day sentence would be grossly disproportionate had it been imposed on the offender in Scofield if he "had been interrupted in his offending prior to its escalation." At para. 65, Judge Frame held in response to this submission that:

I cannot find that a mandatory minimum sentence of 90 days for Mr. Scofield had he been interrupted sooner in his offending would be so excessive as to outrage the standards of decency or be abhorrent or intolerable to society. That a fitter sentence would be more appropriate does not mean that the mandatory minimum sentence is grossly disproportionate or cruel and unusual punishment. That does not meet the high bar or the properly stringent and demanding test to find the mandatory minimum is cruel and unusual punishment.

- [12] In the result, she dismissed the application under s. 12 of the Charter.

- [13] It is that decision which the appellant appeals to this Court.

Analysis

Mootness

- [14] At the outset, I would observe that the appellant has already served the 150-day sentence imposed by Frame P.C.J. This appeal is therefore moot. Both parties submitted the court should nonetheless exercise its discretion to resolve the legal question raised. I quote from the Crown's sentence statement on this point:
6. The appellant has already served his jail sentence. As such, the sentence appeal is moot. Nevertheless, the respondent submits that it is in the interests of justice to resolve the legal question that arises in this appeal: *R. v. Duguay*, 2019 BCCA 53, paras. 57-59; *R. v. Poulin*, 2019 SCC 47, paras. 16-27; *R. v. E.O.*, 2019 YKCA 9, paras. 37-40.
 7. The constitutionality of the [minimum mandatory sentence ("MMS")] in s. 151(b) is an issue of public importance because Charter challenges to the 90 day MMS in s. 151(b) are common and there are currently conflicting Provincial Court decisions in this province and across the country. Further, an appellate decision on this issue may impact the constitutionality of the six month MMS in s. 271(b) and the 90 day MMS in s. 152(b).
 8. A Charter challenge to this MMS typically requires additional court time to address the constitutional issue. Consequently, until there is a binding decision from either the British Columbia Supreme Court or the BCCA striking the MMS, provincial court judges will have to address the constitutionality of the 90 day MMS in each case where the offender challenges the MMS as being grossly disproportionate. This is because, although a provincial court judge can decline to apply an MMS where it has been found to infringe s. 12 and not justified under s. 1, this remedy does not constitute a formal declaration and does not render the law of no force or effect. Thus, it is open to provincial court judges in subsequent cases to decline to apply the MMS, for reasons already given or for their own, but they are not

compelled to do so: *R. v. Lloyd*, 2016 SCC 13, para. 19.

[footnotes omitted]

- [15] I am persuaded it is in the interests of justice for this Court to exercise its discretion to decide the legal issue raised by this appeal in order to provide a binding decision from the British Columbia Supreme Court.

Standard of Review

- [16] The sentencing judge's conclusion that the minimum mandatory sentence was not grossly disproportionate involves a question of law and thus the standard of review is correctness: *R. v. Alfred*, 2020 BCCA 256 at para. 13; *R. v. Bernarde*, 2018 NWTCA 7 at para. 5.

The Test Under s. 12 of the Charter

- [17] The appellant bears the onus of establishing an alleged s. 12 Charter infringement on a balance of probabilities.
- [18] The test under s. 12 of the Charter is both stringent and demanding. Demonstrating a s. 12 breach requires surmounting "a high bar". It is only on "rare and unique occasions" that a sentence will infringe s. 12. The test for whether a particular sentence constitutes "cruel and unusual" punishment is whether the sentence is "grossly disproportionate". To be considered "grossly disproportionate", the sentence must be more than merely excessive. The sentence must be "so excessive as to outrage standards of decency"; be disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable"; be such that most Canadians would be shocked about sentencing the offender to the minimum mandatory sentence; be such that it "would shock the conscience of Canadians"; or that it "would outrage the standards of decency of most informed Canadians": *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1072, 1109, 15 B.C.L.R (2d) 273; *R. v. Morrissey*, 2000 SCC 39 at para. 26; *R. v. Lloyd*, 2016 SCC 13 at paras. 22-24, 32-33; *R. v. Swaby*, 2018 BCCA 416 at para. 87 [Swaby], leave to appeal ref'd [2019] S.C.C.A. No. 17; *R. v. Al-Isawi*, 2017 BCCA 163 at para. 16; *R. v. Boudreault*, 2018 SCC 58 at para. 45.
- [19] The Court of Appeal in *Swaby* provided a helpful summary of the analytical structure to be employed in determining whether a minimum mandatory sentence breaches s. 12:
- [55] Since the introduction of the Charter, mandatory minimum sentences imposed by Parliament have been subject to the scrutiny of s. 12, which provides:

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

- [56] In *R. v. Smith*, [1987] 1 S.C.R. 1045, the Supreme Court of Canada, for the first time, struck down a mandatory minimum sentence on the basis that it violated s. 12. While the majority found that the mandatory sentence of seven years' imprisonment for importing drugs would not be "grossly disproportionate" in all cases, it held that such a sentence could constitute "cruel and unusual punishment" in a reasonable hypothetical factual matrix (at 1077-78).
- [57] Proportionality is an essential ingredient of a just sentence (*R. v. Nur*, 2015 SCC 15 at para. 43). In *Smith*, the majority discussed the meaning of gross disproportionality at 1072-73:

The limitation at issue here is s. 12 of the Charter. In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J. in *Miller and Cockriell*, [[1977] 2 S.C.R. 680], where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J. in *Miller and Cockriell*, *supra*, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

... Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.

In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while s. 1 permits this right to be overridden to achieve some important societal objective.

- [58] The Supreme Court recently examined mandatory minimums in *Nur* and *R. v. Lloyd*, 2016 SCC 13 [Lloyd SCC]. In *Nur*, the Court affirmed the *Smith* approach to gross disproportionality and identified the "high bar" for what constitutes "cruel and unusual punishment" under s. 12 of the Charter. The Court elaborated at para. 39:

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

...

[62] In *Nur*, the majority set out the analytical process to be followed when a mandatory minimum sentence is challenged. First, the court must determine what constitutes a proportionate sentence for the offence based on the objectives and principles of sentencing in the Code (para. 46). Second, it must decide, bearing the proportionate sentence in mind, whether applying the mandatory minimum would result in a grossly disproportionate sentence for the offender before the court (para. 46). Third, if the sentence is not grossly disproportionate for that offender, the court must then consider whether any "reasonably foreseeable applications" of the provision will result in grossly disproportionate sentences for other offenders (para. 77). If the answer to either of the latter two questions is yes, then the mandatory minimum sentence is inconsistent with s. 12 and "will fall unless justified under s. 1 of the Charter" (paras. 46, 105-106).

The Court of Appeal's Decision in *Scofield*

[20] In *Scofield*, the Court of Appeal considered the constitutionality of the one-year minimum mandatory sentence for sexual interference in s. 151(a) of the Code, which applies when the Crown proceeds by way of indictment. Section 151 reads:

151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

- [21] The sentencing court in Scofield had imposed a conditional sentence of six months after a guilty plea on two counts of sexual interference, and declared the mandatory minimum sentence of one year unconstitutional. On appeal, the Court agreed that the mandatory minimum sentence was unconstitutional. A majority of the Court, per Justice Harris, substituted a conditional sentence of one year.
- [22] Having determined that a CSO of one year was a fit and proportionate sentence, Harris J.A. held that the imposition of the mandatory sentence of one year's imprisonment would be grossly disproportionate in Mr. Scofield's circumstances. He wrote at para. 74:

Although his offences were extremely serious and normally attract a term of imprisonment in excess of the one-year mandatory minimum, sending Mr. Scofield to prison for one year, given his significant cognitive deficits, would outrage the standards of most informed Canadians.

- [23] Harris J.A. went on to consider the second stage inquiry from *R. v. Nur*, 2015 SCC 15 [Nur] of whether a minimum mandatory sentence of one-year was also grossly disproportionate on a reasonable hypothetical offender. In this discussion, at para. 77, he referred to the decision of Chief Justice McLachlin in *Lloyd*, where she stated:
- [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.
- [24] Harris J.A. explained that it is because an offence may capture conduct that is different from its principal target that the constitutionality of mandatory sentences is tested against "reasonable hypotheticals". Relying on *Nur* at paras. 68 and 76, he wrote that "the test targets circumstances foreseeably captured by the minimum conduct to commit the offence and takes into account personal circumstances of people who may be caught by the mandatory minimum": *Scofield*, at para. 78.
- [25] In a passage of some relevance to the present appeal, Harris J.A. considered the fact that sexual interference can be proceeded with by indictment or summarily. He stated at para. 81:

I find it difficult to understand how a mandatory minimum of one year is not grossly disproportionate to circumstances that can attract only a 90-day sentence if the Crown elected to proceed summarily. Parliament has, it seems, contemplated the possible existence of circumstances that demonstrate that the one-year mandatory minimum is cruel and unusual punishment.

- [26] Harris J.A. then went on to consider the following reasonable hypothetical (which is referred to as the "Scofield Close-In-Age Hypothetical Offender") at para. 82:

- [82] Consider a case in which two young people meet at a party attended by other young people. One is almost 16 years old. The other turned 21 years old a few months earlier. The close-in-age exception is inapplicable by a few months and certainly less than one year. The two people drink alcohol and smoke marihuana. They are not drunk but their inhibitions are reduced. Finding that they are attracted to each other, they find a private bedroom. They engage in some kissing and brief sexual touching over their clothing, but they do not undress or have intercourse. After approximately ten minutes, they return to the party. During their time together, they act willingly, knowing each other's ages. Neither person has a criminal record. This is the only occasion where either one engages in this kind of conduct with each other.
- [27] At para. 83, Harris J.A. concluded that the imposition of a one-year minimum mandatory sentence on such a reasonable hypothetical offender would be grossly disproportionate, would shock the conscience of Canadians, and would be cruel and unusual punishment. Importantly, he stated that a proportionate sentence would not attract imprisonment or necessarily even a CSO. He wrote at para. 83:
- [83] The result does not turn on the gender of the participants or any other details about the personal circumstances of the older person. Other reasonably relevant factors about the offender that heighten the disproportionate character of the sentence can be added to the hypothetical. As in this case, the offender might have disabilities that reduce moral culpability. Alternatively, the judge might be obliged to consider significant Gladue factors in sentencing.
- [28] The Court of Appeal went on at paras. 84-87 to refer to other reasonable hypotheticals considered in other cases, one of which I will consider in my analysis, but will not review now.

Sentencing for Child Sexual Offences in Light of Friesen

- [29] There is no dispute that sexual interference with a child is a grave offence. Regardless of the nature of the conduct involved, the objective gravity of the offence flows from the fact that the victim of the offence must be, by definition, a child. This is the case notwithstanding the fact that the s. 151 offence embraces a wide spectrum of conduct: *R. v. Friesen*, 2020 SCC 9 at paras. 90-92 [Friesen]; *R. v. Plehanov*, 2020 BCCA 249 at paras. 18-21 [Plehanov].
- [30] The Supreme Court of Canada made it clear that the guidance it provided in *Friesen* is of general application to the imposition of sentences over the wide spectrum of sexual offences against children: *Plehanov*, at para. 19. I note that *Friesen* was released on April 2, 2020, approximately 15 months after the Court of Appeal's decision in *Scofield* and approximately six weeks before the sentencing decision under appeal.

- [31] In *Friesen*, the Supreme Court delivered a "strong message" that sentences for sexual offences against children must increase: at paras. 5, 110, 114. Chief Justice Wagner and Justice Rowe, writing for a unanimous court, held that, "imposing proportionate sentences that respond to the gravity of sexual offences against children and the degree of responsibility of offenders will frequently require substantial sentences": at para. 114.
- [32] At para. 5, the Supreme Court summarized its message as follows:
- [5] we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.
- [33] Furthermore, Parliament's decision to increase the maximum sentence for sexual interference in 2015 is an important factor when assessing the gravity of the offence. A decision by Parliament to increase maximum sentences for certain offences shows that Parliament "wanted such offences to be punished more harshly": *Friesen*, at paras. 45, 95-100. Finally, the objective gravity of sexual interference also flows from s. 718.01 of the Code, which requires that deterrence and denunciation have priority in sentencing for offences involving the abuse of a person under the age of 18 years, while leaving the sentencing judge discretion to accord significant weight to other factors, including rehabilitation and Gladue factors, in accordance with the overall principle of proportionality: *Friesen*, at paras. 101-105.
- [34] At the same time, the Supreme Court cautioned against disregarding relevant factors that may reduce an offender's moral culpability. Sexual interference is a broadly defined offence that embraces a wide spectrum of conduct, meaning that some offenders' conduct will be less morally culpable than others. Further, the personal circumstances of an offender, such as mental disabilities that impose serious cognitive limitations, may be mitigating: *Friesen*, at para. 91. Similarly, where an offender is Indigenous, "courts must apply the principles from *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, and *Ipeelee*. The sentencing judge must apply these principles even in extremely grave cases of sexual violence against children": *Friesen*, at para. 92.
- [35] In the wake of *Friesen*, the gravity of the offence and the harm to the child victim will weigh heavily in determining the fit sentence even if the offender's moral culpability is otherwise reduced because of cognitive limitations: *R. v. Williams*, 2020 BCCA 286 at paras. 28-37 [Williams]. It is notable in this regard that in *Williams* the Court of Appeal held that the effective custodial sentence of five years imposed on the offender for two counts of sexual

interference was fit despite the sentencing judge's error in not specifically considering the offender's significant mental health challenges and difficult personal history as mitigating factors: at paras. 30, 60.

[36] In this regard it is helpful to refer to the following passage from para. 35 of Williams:

In that regard, I agree with the Crown's submission that the Court's message in Friesen is clear. It is not sufficient for courts to simply state that sexual offences against children are serious; sentences must be imposed that reflect the normative character of the offender's actions (para. 76) and the consequential harm, which includes both actual and potential harm (paras. 79-86).

[37] There is case law post-Friesen to the effect that offenders with significant mitigating circumstances, including youth, having intellectual disabilities or mental health conditions related to their offending, or having significant Gladue factors, may be sentenced to CSOs or other non-carceral sentences for sexual offences against children. Without referring to every case, I note that, for example, in *R. v. Kapolak*, 2020 NWTTC 12 [Kapolak], the offender was an 18-year-old Indigenous man with an intellectual disability who was found guilty of sexual assault on a 15-year-old girl. Chief Judge Gagnon held that the six-month minimum mandatory sentence was grossly disproportionate on a particularized inquiry, and found it to be contrary to s. 12. She ordered the offender to serve a CSO of 120 days, followed by a probation period of 18 months.

[38] In *R. v. Gargan*, 2021 NWTTC 9 [Gargan], Chief Judge Gagnon also held that the 90-day mandatory minimum sentence in s. 151(b) for sexual interference was unconstitutional. The 18-year-old accused had attended a community event with the 13 year-old-complainant. He reached out to hug her, and touched her buttocks. Both the complainant and the accused were Indigenous. The accused was remorseful. The complainant did not provide a victim impact statement, and the Judge inferred the incident had a relatively minor impact on her. The Judge found that a proportionate sentence would be on a range between a suspended sentence with a period of probation, to a short period of custody, including a CSO. She held that the 90-day mandatory minimum sentence would be grossly disproportionate to the seriousness of the offence and the moral blameworthiness of the accused, and that imposition of it would infringe s. 12. She sentenced the offender to a term of imprisonment of one day (which was served by his attendance in court), followed by a period of probation of 12 months.

[39] In *R. v. D.A.D.*, 2021 YKTC 20, Chief Judge Cozens of the Territorial Court of Yukon relied on *R. v. Pye*, 2019 YKTC 21 [Pye], and declared the minimum mandatory sentence in s. 151(b) unconstitutional. As indicated at para. 15, the Crown submitted that, in light of Friesen, Pye should be reconsidered, as "a 90-day custodial sentence for sexually touching a child should not be considered grossly disproportionate in any circumstances". Chief Judge Cozens disagreed. In his view, the conduct of the accused, who was 28 years of age, in sexually touching his 15-year-old cousin, was on the lower end of the scale, as he touched her once outside of her clothes. Both the accused and the victim were Indigenous. He was of the view

that a CSO followed by probation was appropriate. Chief Judge Cozens concluded that Friesen did not alter the decision in Pye, and followed Pye in holding the mandatory minimum sentence in s. 151(b) unconstitutional.

- [40] R. v. Prince, (September 1, 2021) Prince George 48001-1 (B.C.P.C.) concerned three counts of sexual assault involving the accused touching three young children. Pursuant to s. 271(b) of the Code, there was a minimum mandatory sentence of six months. The children were in a public swimming pool, and the accused was found to have touched the victims in the area of their buttocks, either on top of their bathing suits or just below. The accused was 67 years old, and had very significant Gladue factors. The Judge concluded that in light of all the aggravating and mitigating factors, a fit sentence would be a two-month CSO on each count. He readily concluded that a six-month jail sentence would be grossly disproportionate on a particularized inquiry. At paras. 54-57, McDermick P.C.J. then considered the Scofield hypothetical, with the same post-Friesen amendments suggested by the Crown in this case, and concluded that the six-month minimum mandatory would at least constitute a grossly disproportionate sentence.
- [41] In R. v. Colucho-Romero, 2020 ONCJ 344 the court did not engage in a s. 12 analysis, simply relying at para. 14 on earlier decisions which had declared the s. 151(b) minimum mandatory sentence to be unconstitutional. The court, relying on the 25-year-old accused's mental health issues, the fact that he had spent 30 days in jail before being released on bail, and his guilty plea, held that a CSO of 12 months followed by a three-year probation term was fit and proper.

Is the Minimum Mandatory Sentence in s. 151(b) Contrary to s. 12 of the Charter?

- [42] The Crown submits, and I agree, that the fact the Court of Appeal in Scofield found the one-year minimum mandatory sentence under s. 151(a) unconstitutional does not necessarily mean that the 90-day minimum mandatory sentence under s. 151(b) is also unconstitutional. But it does offer important guidance in considering that question, to which I now turn.
- [43] The Scofield Close-In-Age Hypothetical Offender was identified prior to Friesen. As such, this Court must determine if Friesen undermines the reasonableness of Harris J.A.'s hypothetical. The Crown submits there are certain aspects of the Scofield Close-In-Age Hypothetical Offender that are no longer relevant post-Friesen. First, the Crown submits it is legally irrelevant that the 21-year-old and almost 16-year-old were "attracted to each other" and "acted willingly": Friesen, at paras. 148-154. Second, the Crown submits that Friesen reminds us that "a victim's participation should never distract the court from the fact that adults always have a responsibility to refrain from engaging in sexual violence towards children": Friesen, at para. 154.

- [44] The Crown submits that the Scofield Close-In-Age Hypothetical Offender will have to be recast post-Friesen in order to expunge these irrelevant considerations which have the effect of diminishing the seriousness of the offence and the moral culpability of the hypothetical offender.
- [45] The Crown submits that the following deletions eliminate the now legally irrelevant parts of the Scofield Close-In-Age Hypothetical Offender:
- [82] Apart from this, the mandatory minimum must fail the reasonable hypothetical test. Consider a case in which two young people meet at a party attended by other young people. One is almost 16 years old. The other turned 21 years old a few months earlier. The close-in-age exception is inapplicable by a few months and certainly less than one year. The two people drink alcohol and smoke marihuana. They are not drunk but their inhibitions are reduced. Finding that they are attracted to each other, they find a private bedroom. They engage in some kissing and brief sexual touching over their clothing, but they do not undress or have intercourse. After approximately ten minutes, they return to the party. During their time together, they act willingly, knowing each other's ages. Neither person has a criminal record. This is the only occasion where either one engages in this kind of conduct with each other. [Strikethroughs added by Crown]
- [46] I agree with the Crown's suggested amendments to the Scofield Close-In-Age Hypothetical Offender. With those amendments, I find that it is a reasonable hypothetical which can be applied to determine if the 90-day minimum mandatory sentence would be grossly disproportionate.
- [47] The Crown also submitted that the following hypothetical ("the Isolated Caress Hypothetical") from Scofield could also be considered under s. 151(b). The Crown added the strikethrough to reflect changes in the law by virtue of Friesen:
- [86] An isolated caress, over the clothes, on the thigh or buttocks, by a person who is not an authority figure, and without consequences for the victim" [strikethrough added by Crown].
- [48] To a certain extent, this hypothetical resembles the facts of the individual offender in Gargan, and the reasonable hypothetical offender from R. v. Drumonde, 2019 ONSC 1005 at para. 50 [Drumonde].
- [49] The phrase "without consequences for the victim" needs to be recast as "where there is no reasonably foreseeable potential for harm": Friesen, at paras. 79-84. With this change, I find that this is a reasonable hypothetical that can be employed to determine if the 90-day mandatory minimum sentence would be grossly disproportionate.
- [50] I return to a consideration of the Scofield Close-In-Age Hypothetical Offender, as amended in light of Friesen. In my view, the 90-day mandatory minimum sentence required under s. 151(b) could be grossly disproportionate if applied to that hypothetical. Like Harris J.A. at para. 83, I consider that "[o]ther reasonably relevant factors about the offender that heighten the disproportionate character of the sentence can be added to the hypothetical the offender

might have disabilities that reduce moral culpability. Alternatively, the judge might be obliged to consider significant Gladue factors in sentencing."

- [51] Several of the cases I have already referred to highlight the impact of such factors on a hypothetical offender's moral culpability. Several of the cases, including Kapolak, Swaby, and Scofield itself demonstrate how intellectual disabilities might substantially reduce a hypothetical offender's moral culpability to the point that a 90-day sentence would be grossly disproportionate. Other cases I have referred to, in particular Prince, demonstrate how significant Gladue factors might need to be considered in sentencing such a hypothetical offender, resulting in a 90-day sentence of imprisonment being grossly disproportionate.
- [52] I come to the same conclusion in respect of the Isolated Caress Hypothetical. It is not difficult to imagine circumstances in which the imposition of a 90-day sentence on an offender who had engaged in an isolated caress of a victim's thigh or buttocks would be grossly disproportionate.
- [53] The Gargan facts illustrate this point. At para. 40, Judge Gagnon found that an appropriate range of sentence for situations involving minor momentary touching "would call for a sentence ranging from a suspended sentence to a conditional sentence, or at most, a custodial sentence measured in days, not months". She held that:
- [42] Imposing a sentence of 90 days in jail on this accused who did not have a criminal record at the time of the offence, when there are many mitigating and "Gladue" factors, and when the circumstances of the offence are not too egregious, is fundamentally unfair and as a result, disproportionate.
- [43] Reducing the over-incarceration of Aboriginal offenders is as important an objective as that of protecting vulnerable victims, and it must be given equal consideration.
- [44] For all these reasons, I find that the mandatory minimum sentence of 90 days in jail is grossly disproportionate to the seriousness of the offence and the moral blameworthiness of the accused. As a result, then, I find that the accused's right to be protected against cruel and unusual treatment or punishment is infringed by the mandatory minimum punishment found at section 271(b) of the Criminal Code.
- [54] I agree with that analysis, which was undertaken post-Friesen.
- [55] Also of assistance is the pre-Friesen case of Drumonde. In that case, the summary sentence appeal justice upheld the trial judge's conclusion that the 90-day mandatory minimum sentence in s. 151(b) was grossly disproportionate under a hypothetical inquiry for "an unwanted kiss or attempted kiss by an 18-year old on a 15-year-old": at para. 50. In a comment which reflects the court's awareness of the seriousness nature of sexual interference, the court stated that it did:

not draw this conclusion because I think that such conduct is not serious. In my view any unwanted touching of a sexual nature is serious. Whether it deserves a sentence of imprisonment is another matter. In my view, it does not.

- [56] After citing Swaby, at para. 87, where the British Columbia Court of Appeal agreed with the trial judge's conclusion that the 90-day mandatory minimum sentence for possession of child pornography was grossly disproportionate, the summary sentence appeal justice stated that, in "my view, the same conclusion would be reached if Mr. Swaby gave an unwanted kiss to a 15-year-old": at para. 55. The court in Drumonde declared the mandatory minimum sentence in s. 151(b) to be of no force or effect.
- [57] In this connection, I note the Crown's submission that Swaby is distinguishable. The Crown submits that care must be taken in relying on Swaby when considering the constitutionality of the mandatory minimum sentence for sexual interference, as Swaby was a case dealing with the possession of child pornography. While I appreciate that Swaby and the present appeal deal with different offences, I find both Swaby, and the court's reliance on it in Drumonde, of assistance in the present context. Both offences have mandatory minimum sentences of 90-days, and both are directed to the sexual victimization of children. Certainly, if one considers the nature of the accused's offending conduct in Swaby, I do not think any suggestion that it was less serious than the range of conduct which may be caught by s. 151(b) can be sustained.
- [58] In reaching my conclusion that the minimum mandatory sentence in s. 151(b) offends s. 12 of the Charter, I have considered the cases in Canada, including the sentencing decision on appeal, that have come to a contrary conclusion. In particular, I have reviewed *R. v. Gumban*, 2017 BCPC 226 [Gumban] and *R. v. C.D.*, 2021 NUCJ 20. Gumban was decided before Scofield, and the court's characterization at para. 64 of the hypotheticals proposed by the defence as "far-fetched" appears inconsistent with the Court of Appeal's treatment of similar hypotheticals in the latter case. I agree with the critique provided of Gumban at para. 61 of Drumonde.
- [59] Turning to *R. v. C.D.*, I would note that it is inconsistent with the previous decision of the Chief Justice of Nunavut Court of Justice in *R. v. G.H.*, 2020 NUCJ 33, and that another judge of that court declined to follow it in *R. v. D.F.*, 2021 NUCJ 39. Suffice to say I prefer the reasoning in those cases.
- [60] I agree with the Crown's submission that this is an issue upon which reasonable and informed opinion can disagree. Nonetheless, I am satisfied that the minimum mandatory sentence of 90-days prescribed for sexual interference under s. 151(b) could be, on reasonable hypotheticals illustrated in the cases I have discussed, grossly disproportionate. The imposition of such a sentence would, in those cases, outrage the sense of decency of most Canadians. It would result in cruel and unusual punishment, contrary to s. 12 of the Charter. In the event this Court found the minimum mandatory sentence to violate s. 12, the Crown did not seek to justify it pursuant to s. 1 of the Charter.

Conclusion

[61] Accordingly, I declare the minimum mandatory sentence in s. 151(b) to be invalid and of no force or effect.

[62] In the event a declaration of invalidity was made, counsel for the appellant sought to have this Court impose the conditional sentence on him that the sentencing court found to be the most fit sentence. I decline to do so. The appellant has already served his sentence, and I do not see any utility and there may be significant practical difficulty in retroactively imposing on him the sentence the sentencing judge would have imposed had it been open to her to do so.

"Lyster J."

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