

CANADA / JUDGMENT

R. v. Graf

2020 BCSC 1612

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Graf,

2020 BCSC 1612

Date: 20201019

Docket: 29256-1

Registry: Vancouver

Between:

Her Majesty The Queen

And:

Roland Michael Graf

Restriction on publication: A publication ban has been imposed under ss. 486.4(1) and 486.5(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of any information that could identify a complainant or a witness. This publication ban applies indefinitely unless otherwise ordered

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment

Counsel for the Crown:

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A.J. Robinson

E. Talic

Place and Dates of Hearing:

Vancouver, B.C.

August 26, 2020

September 28-29, 2020

October 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 19, 2020

I. Introduction

[1] This sentencing follows from a guilty plea to the offence often referred to as criminal harassment contrary to s. 264 of the Criminal Code, R.S.C. 1985, c. C-46. On August 26, 2020, Mr. Graf pleaded guilty to Count 2 on Indictment 29256-1, as amended, which now reads as follows:

Roland Michael GRAF, from the 12th day of June 2017 to the 14th day of October 2017, inclusive, at or near Richmond, in the Province of British Columbia, without lawful authority and knowing that another person was harassed or was reckless as to whether the other person was harassed, did engage in conduct that caused that other person, M.D., to reasonably fear for her safety or the safety of anyone known to her, contrary to Section 264 of the Criminal Code.

[2] I note at the outset that the publication bans made previously under ss. 486.4(1) and 486.5(1) in relation to the names of the victim and witnesses in this matter continues to apply to this sentencing proceeding.

[3] Count 1 on the Indictment is a charge of sexual assault contrary to s. 271 of the Criminal Code. At the conclusion of this sentencing, I understand that it will be stayed.

[4] The Crown submits that a sentence of six months' jail ought to be imposed followed by a probation order for three years.

[5] Defence counsel says that a conditional discharge with a three-month term of probation is a fit and appropriate sentence.

[6] There will also be ancillary orders discussed at the end of sentencing.

II. Evidence

[7] The Court has the benefit of the following evidence and materials:

(a) Agreed Statement of Facts on Sentencing signed by the parties dated August 17, 2020; and

- (b) Victim Impact Statements of M.G. (victim), L.G. (mother), R.P.G. (father), and R.C.G. (sister).

III. Circumstances of the Offence

- [8] The circumstances of the offence are set out in the Agreed Statement of Facts, tendered pursuant to ss. 655 and 724(1) of the Criminal Code. I will read the Agreed Statement of Facts into the record as it sets out the offence before the Court for sentencing. As I read, I will note some additional facts from the sentencing hearing and include them in square brackets.
- [9] I agree with counsel that the facts support the charge pursuant to s. 606(1.1)(c), and therefore I accept the guilty plea.
- [10] The Agreed Statement of Facts is as follows:

ROLAND MICHAEL GRAF

AGREED STATEMENT OF FACTS ON SENTENCING

Pursuant to ss. 655 and 724(1) of the Criminal Code, R.S.C. 1985, c. C-46, the following facts are admitted at the sentencing of this matter:

Background

1. Mr. Graf was born in 1963. M.D. was born in 1991.
2. At all relevant times, Mr. Graf was a manager and part-owner of [XXXXXXXXXXXXXXXX] in Richmond, British Columbia.
3. In approximately June 2016, Mr. Graf hired M.D. as a server and bartender at [XXXXXXXXXXXXXXXX].

[M.D. is now referred to by her present initials, M.G.]

4. Mr. Graf immediately developed feelings for M.D. He became romantically interested in and eagerly pursued a relationship with her. While she was at work, Mr. Graf would shower M.D. with attention and dote on her.
5. From June 2016 to June 2017, M.D. and Mr. Graf frequently exchanged personal text messages. In the text messages, Mr. Graf repeatedly expressed that he was both physically and emotionally attracted to - and "infatuated with" - M.D. Mr. Graf's forwardness and romantic advances went largely unrequited by M.D.; however, her responses were generally congenial and amicable. Some of their conversations could be described as flirtatious.
6. During this time period, Mr. Graf was struggling with an addiction to alcohol. He was also suffering from depression. Mr. Graf frequently turned to M.D. for emotional support and validation.

7. In certain text messages with M.D. in May and June 2017, Mr. Graf alluded to ending his life and obliquely threatened to kill himself. On one occasion during this timeframe, the text messages that he sent M.D. caused her to attend at his residence in order to ensure his safety and wellbeing.

Incident

[These facts refer to Count 1 which will be stayed.]

8. On June 11, 2017, M.D. completed her regular shift at [XXXXXXXXXXXXXX] at approximately 9:00 pm. She then went to Legends Pub in Richmond. Mr. Graf met her there. Mr. Graf and M.D. consumed alcohol together at Legends Pub.
9. At the conclusion of the evening, M.D. indicated that she was going to drive to her parents' house in White Rock. Due to late hour and the fact that she had consumed alcohol, Mr. Graf demurred and suggested that she not drive all the way to White Rock as it was too far.
10. The parties went to Mr. Graf's home in Richmond, which was nearby. M.D. drove them there in her vehicle. Mr. Graf left his vehicle near the Legends Pub. On the way to Mr. Graf's residence, they went to a McDonald's drive-thru.
11. Once inside Mr. Graf's residence, M.D. appeared upset and uncomfortable. Mr. Graf asserted that M.D. was not in a condition to drive home. He proposed that M.D. spend the night at his house. He suggested that she stay with him so that he would not be alone. Mr. Graf indicated that M.D. could sleep in his bed and that he would sleep on the couch.
12. Mr. Graf brought M.D. into his bedroom. M.D. remained clothed and got into the bed. Mr. Graf removed his pants and got into the bed with M.D. wearing his underwear and a t-shirt.
13. A prolonged sexual encounter took place, to which Mr. Graf mistakenly believed that M.D. was consenting. At no time did M.D. affirmatively express by words her voluntary agreement to the sexual activity that occurred.
14. The next morning, on June 12, 2017, M.D. drove to her parents' house in White Rock following daybreak. Mr. Graf walked her to her car before she departed.
15. Mr. Graf and M.D. then exchanged several text messages to the effect that M.D. had made it safely to her parents' house in White Rock.
16. Following the incident, M.D.'s sister called the [XXXXXXXXXXXXXX] and advised that M.D. was not going to be working there any longer.

Criminal Harassment

[The offence which is the subject of the sentencing.]

17. Following the incident, Mr. Graf repeatedly communicated with M.D.
18. On June 12, 2017, Mr. Graf sent 5 text messages to M.D. that M.D. did not respond to.

[Mr. Graf entered residential treatment.]

19. On June 15, 2017, Mr. Graf sent 1 text message to M.D. that M.D. did not respond to.
20. On June 18, 2017, Mr. Graf sent 1 text message to M.D. that M.D. did not respond to.
21. On June 20, 2017, Mr. Graf sent a lengthy email to M.D. that M.D. did not respond to.
22. On June 29, 2017, Mr. Graf sent 1 text message to M.D. that M.D. did not respond to.
23. In or about the beginning of July 2017, Mr. Graf sent M.D. a bouquet of sunflowers and a McDonald's gift certificate delivered to her father's office.
24. On July 5, 2017, Mr. Graf sent 1 emoji message (a sunflower and a sun) to M.D. that M.D. did not respond to.

[On July 12, 2017 Mr. Graf left the residential treatment facility.]

25. On July 14, 2017, Mr. Graf sent 1 text message to M.D. that M.D. did not respond to.
26. On July 15, 2017, Mr. Graf sent 1 text message to M.D. that M.D. did not respond to.
27. On July 21, 2017, Mr. Graf sent 1 text message to M.D. that M.D. did not respond to.
28. On July 27, 2017, Mr. Graf sent a short email to M.D. that M.D. did not respond to.
29. On July 29, 2017, Mr. Graf sent 2 text messages to M.D. that M.D. did not respond to.
30. On August 9, 2017, Mr. Graf sent 1 text message to M.D. that M.D. did not respond to.
31. On August 20, 2017, Mr. Graf and M.D. had the following text message exchange:

Mr. Graf: Enjoy your day!

M.D.: Don't message me ever again.

Mr. Graf: It was a mistake, meant for michelle [sic]. I'm sorry your [sic] so mad at me

M.D.: Delete my contact. No more mistakes at my expense.

Mr. Graf: Okay. I never wanted to upset you so much, I do care.

32. On August 27, 2017, Mr. Graf sent the following text message to M.D.:

[M.D.] I wish so so much you could explain to me what I have done. I'm definitely guilty of unintentionally falling in love with you, sorry but it was a [sic] uncontrollable and very real emotion. Please forgive, I'm suffering big time. Have a terrific time at Burning Man! Make sure your [sic] safe!! Please

33. On August 28, 2017, M.D responded to Mr. Graf's text message from the previous day, resulting in the following exchange:

M.D.: LEAVE ME ALONE!

[this message was only sent once, but it appears twice - once as a text message and once as an iMessage]

Mr. Graf: Your [sic] clearly at the wrong testable [sic] [M.D.], what about my freedom of expression? How about not being judged in such a [sic] abusive manner? Not even the decency to give any explanation. Your [sic] being incredibly cruel, don't understand how anyone can do this to someone (I'm also a person). I only have complete respect for you, perhaps I complete [sic] misjudged the compassionate person I thought you were. Have a great time

M.D.: I'll repeat myself one last time .. delete my contact Roland. Do what I asked.

34. On August 28, 2017, following the above exchange, Mr. Graf sent 3 further text messages and a screenshot of previous text messages to M.D. that M.D. did not respond to.

35. On September 24, 2017, Mr. Graf sent 1 text message to M.D. that M.D. did not respond to.

On or about October 14, 2017, Mr. Graf shared and publicly commented on a video publicly posted to Facebook. With respect to M.D., he posted the comment: "Wow, how pathetic and fake she can be."

[This message was posted on Mr. Graf's page for his followers.]

36. Evidence of the above communications is attached as Exhibit "A".

37. From June 12, 2017, to October 14, 2017, inclusive, Mr. Graf, without lawful authority and reckless as to whether M.D. was harassed, engaged in repeated communication with M.D., directly and indirectly. This conduct caused M.D. reasonably, in all the circumstances, to fear for her safety. Mr. Graf's conduct amounts to the offence of criminal harassment under s. 264 of the Criminal Code.

[11] The admission is that Mr. Graf was reckless as to whether M.D. was harassed, rather than that he knowingly engaged in the conduct of the offence.

IV. Circumstances of the Offender

[12] Mr. Graf is currently 57 years old. He was 53 at the time of the offence.

[13] Mr. Graf has no criminal record and no outstanding charges.

[14] Mr. Graf has been employed for his entire life. He has worked as an electrician and mechanic. He has a passion and talent for repairing vehicles and often assists his friends with their vehicles. For many years, he has been involved in the entertainment and service industry. He has been a part-owner of the pub for eight years.

- [15] Mr. Graf was divorced fourteen years ago. His three adult children are very supportive of their father. They wrote letters of support and attended these court proceedings as much as possible. Mr. Graf's sister and brother-in-law also attended court, as did a number of his friends. Five friends, including current and former colleagues, filed character reference letters describing their support and high regard.
- [16] Mr. Graf had suffered for many years from mental health issues and alcoholism. Shortly after the Incident described above, his children intervened and he entered a residential treatment facility where he stayed for a month, until about July 12, 2017. Since that treatment three years ago, he has consumed less alcohol and is much healthier. However, Mr. Graf has taken no steps since July 2017 to address his alcohol and mental health issues with therapy or treatment, except for a recent visit to a doctor for mental health.

V. Victim Impact Statements

- [17] Pursuant to the provisions of s. 722(1) of the Criminal Code, the Court has received and heard victim impact statements read from M.G., her mother, her father and her sister.
- [18] Section 718.2(a)(iii) of the Criminal Code sets out a statutory aggravating factor that directs a court to take into consideration an increased sentence when there is "evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation". In this case, the victim impact statements are important evidence to be considered in determining if that statutory aggravating factor is applicable.
- [19] As Mr. Graf submitted, it is necessary to discern what of the impact to M.G. occurred due to this offence, harassment, and what resulted from the charge that will be stayed, sexual assault, and the Incident described in the Agreed Statement of Facts. He says that much of the Victim Impact Statements is not meaningfully relevant, and is ambiguous, thus to be given little weight.
- [20] While in some respects that distinction is relatively straightforward (as in M.G.'s sister's statement which describes the days after the Incident), in many other instances the impact of both charges is combined or intermingled.
- [21] Taking into account that Mr. Graf is being sentenced for the offence of harassment only, these are some of the impacts that I attribute to that offence:
- R.P.G. says that it has been painful watching his daughter struggling to heal emotionally. I note that the harassing communication that is the subject of this sentencing prolonged the contact with Mr. Graf after the Incident.

· L.G., the victim's mother, verbally described the source of the impact on her daughter as going beyond the night in question. She describes M.G. has now having suicidal thoughts, anxiety, and depression. This is in marked contrast to previous to 2017, when she was feisty, brilliant and creative with the promise of a bright future.

· M.G. wrote, and read in her statement, that this was not one incident but a year of torture and brainwashing. The effect continues on her professional life, her mental and physical health, her financial circumstances from being unable to work as previously in the service industry or to further her career, and the ability to have healthy relationships. She is in ongoing therapy and treatment for "the long-term effects of this ongoing and brutal year of trauma".

I understand that the year referred to by M.G. means both before and after the Incident and including the time of the offence.

[22] M.G. was profoundly negatively affected and continues to be affected by the Incident and the offence, both in 2017. In the context of the statements by all family members, I conclude that the four months of the harassment had a serious effect on M.G., a woman who Mr. Graf knew to be vulnerable.

[23] I am mindful of the Court of Appeal case of R. v. Fisher, 2019 BCCA 33, which discusses s. 4 of the Victims of Crime Act, R.S.B.C. 1996, c. 478 and the impact of the offence as perceived by the victim.

[24] However, I do not find that the evidence supports a finding that the statutory aggravating factor in s. 718.2(a)(iii.1) is made out. There is no doubt that the combined effect of the perceived non-consensual sexual encounter together with the harassment was and continues to be damaging to M.G. and to her family. However, I cannot find that the significant impact, required by s. 718.2(a)(iii.1), is attributable to the offence of harassment alone. The Court cannot take into account the impact from the Incident and the charge that will be stayed, as devastating as I understand those are.

VI. Mitigating Circumstances

[25] The following mitigating circumstances are relevant to the determination of Mr. Graf's sentence.

[26] Mr. Graf expressed his remorse in a letter and a statement to the court.

[27] This was a guilty plea indicated about two months pre-trial and prior to jury notices being sent.

[28] The residential treatment for alcoholism has assisted his recovery and mental health. However, I note that the harassing emails continued while he was at the treatment facility. I also note that Mr. Graf has taken no steps since July 2017 to address his alcohol and mental health issues with therapy or treatment except for one recent visit to a doctor for mental health.

[29] After four months, the unwanted communication ceased. The harassing conduct ended before the involvement of the police.

[30] Mr. Graf has no criminal record and no outstanding charges.

[31] There were no breaches while on bail.

[32] He has the support of his children and friends.

VII. Aggravating Circumstances

[33] The following aggravating circumstances are relevant to the determination of Mr. Graf's sentence.

[34] Mr. Graf was the employer of M.G and was therefore in a position of trust or authority. It was after the first harassing emails that he learned that she had quit her job at the pub that he managed and of which he was the part-owner. In the later emails he offered her job back. This is a statutory aggravating factor pursuant to s. 718.2(a)(iii). He abused a position of trust or authority in relation to M.G.

[35] At the time of the offence, Mr. Graf was 53 and M.G. was 26. In addition to the age difference, Mr. Graf knew of M.G.'s personal history of past difficulties and "several past demons" as he described her struggles in the June 20, 2017 email.

[36] The duration, character and content of the harassing conduct is aggravating. The 22 text messages, 2 emails, a Facebook post and gifts included attempts to manipulate, self-serving communications that he felt assisted his recovery, and continued contact in a demeaning tone after M.G. told him to quit contacting her without regard for M.G. or respect for her requests to stop the contact. As stated above, although he went to residential treatment soon after the Incident, he sent harassing emails and the gifts during the month in treatment.

VIII. the law

A. The Criminal Code

[37] The fundamental principle of sentencing set out in s. 718.1 states that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility or culpability of the offender".

[38] Section 718 provides the fundamental purpose and objectives of sentencing, among which are denunciation and general deterrence.

[39] Section 718.2(b) is the parity principle: "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".

- [40] Section 718.2(d) directs that "an offender should not be deprived of liberty if less restrictive sanctions are appropriate in the circumstances". Section 718.2(e) requires the Court to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community".
- [41] Section 718.2 sets out certain principles of sentencing that must be considered. Section 718.2(a) directs that a court should take into consideration the principle that "a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender" and, without limiting the generality of that direction, sets out several deemed aggravating circumstances. The aggravating factor set out in ss. 718.2(a)(iii) is applicable here:

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.

B. The Case Law

- [42] Two oft-cited passages which set out the nature of this offence and the principles of sentencing relevant to it are *R. v. Bates*, [2000] O.J. No. 2558 at paras. 30 and 35 (C.A.); and *R. v. Wall* (1995), 136 Nfld & P.E.I.R. 200 (SCAD) cited below in *R. v. Owens*, 2007 ONCJ 194 at para. 17:
- [17] The court has a broad discretion with respect to sentence for these offences, having regard, of course, to the principles of sentencing set out in section 718 of the Criminal Code. I have reviewed the cases provided to me by counsel with respect to sentence for criminal harassment. In *R. v. Bates*, 2000 CanLII 5759, the Court of Appeal for Ontario quoted with approval the following passage from the decision of the P.E.I. Supreme Court (Appeal Division) in *R. v. Wall*:

The very unsettling aspect of dealing with these offences in the criminal justice system is that, undoubtedly, many offenders will be presenting themselves with no criminal record and with the reputation of being both a good family and community person. The other unsettling aspect of these cases is that if the pattern of harassing conduct continues and is not properly dealt with by the sentence imposed, the result could be very serious physical and/or emotional harm to the victim. In passing sentence judges must, therefore, be wary of positive presentence reports depicting the offender as a person whose actions, in respect of the offence, are entirely out of character. The fact an offender shows any propensity towards this kind of conduct, regardless of his unblemished past, is cause for great concern and for a very careful and judicious approach to sentencing. Factors such as the absence of a prior criminal record and expressions of remorse, which must necessarily be considered in sentencing, should not be given undue weight in the sentencing of this offence.

The focus of sentences must be to send a message to the offender, and the public, that harassing conduct against innocent and vulnerable victims is not tolerated by society and most importantly, the Court must insure, as best it can, that the conduct of the offender never happens again recognizing that, if it does, a far more serious offence could be committed. The principles of sentencing must be applied with this focus squarely in mind.

[43] In *Bates*, the Ontario Court of Appeal stated:

[30] The courts have been made increasingly aware of the escalation of domestic violence and predatory criminal harassment in our society. Crimes involving abuse in domestic relationships are particularly heinous because they are not isolated events in the life of the victim. Rather, the victim is often subjected not only to continuing abuse, both physical and emotional, but also experiences perpetual fear of the offender.

[35] Domestic violence and harassment cases most often involve conduct directed by a male spouse or partner against a woman. Yet offenders who feel empowered to harass a partner or former partner with impunity will not necessarily confine their behaviour to that person, but may also harass and terrorize her friends and family members. As this case illustrates, the respondent somehow perceived that his love and need for the complainant allowed him to be an unwanted presence in her life and in the lives of her family and associates, and to threaten and terrorize them to achieve his ends. His irrational actions made him a menace to Ms. Emmett and to those close to her.

[44] Although the maximum sentence for criminal harassment is imprisonment for ten years, the case law following *Bates* and *Wall* demonstrates that sentences are fact-specific: *R. v. Myers*, 2019 BCSC 457 at para. 62; *R. v. Settle*, 2019 ABPC 328 at paras. 153-155. The sentences range from a conditional discharge, to a suspended sentence, to somewhat more or less than one year of jail, to up to 4.5 years of jail as in *R. v. Taylor*, 2014 BCCA 304. Usually, sentences are in the range of a few months to a few years, and longer sentences typically involve violence: *R. v. Verral*, 2003 ABCA 184 (cited in *Settle* at paras. 51-53 and *Myers* at paras. 91-92). Sentences at the higher end of this range are often imposed in cases with serious and lengthy harassment directed towards a former intimate partner: *Myers* at para. 98.

[45] While the case law is highly fact-specific, certain considerations relevant to criminal harassment may mitigate or aggravate the offender's sentence. These were set out in *Settle* at para. 99, and include:

- (a) the length of time of the harassment;
- (b) the number of victims;
- (c) the nature of the harassment;
- (d) the frequency and duration of the harassing conduct;

- (e) the presence of violence or threats;
 - (f) and whether or not the harassment occurred in the face of court orders.
- [46] In addition, certain personal circumstances of the offender may aggravate or mitigate the offence. The presence of a criminal record will be an aggravating factor. Both pleading guilty and demonstrating remorse are mitigating factors.
- [47] Appended to these Reasons is a chart of relevant cases submitted by counsel for Mr. Graf and revised to include additional information. I have considered each case in the chart; however, I will refer to only some of the cases in the following analysis.
- [48] In addition to the case law provided in the chart, I rely on the thorough discussion of case law by Justice Verhoeven in Myers.

IX. discussion

- [49] There is no issue that the sentencing objectives of denunciation and general deterrence pursuant to s. 718 are paramount in sentencing for this offence.
- [50] With respect to the statutory aggravating factor set out in s. 718.2(a)(iii) of the Criminal Code, as discussed above, Mr. Graf abused a position of trust or authority in relation to M.G. He was approximately 28 years her senior; M.G. was 26 years old and Mr. Graf was 53 years old. She lacked years of maturity, judgment, and life experience compared to him. He hired her; she was employed by him. It was after the first harassing emails that he learned that she had quit her job at the pub that he managed and of which he was the part-owner. In the later emails, he offered her job back. He was her manager and a part-owner of the pub where she worked at an entry-level position. Her livelihood depended on his continued employment of her. **
- [51] While I have not found that the statutory aggravating factor in s. 718.2(a)(iii.1) applies, the victim impact statements make it clear that the offence has had a serious effect on M.G. and her family as also discussed above. She still suffers from debilitating anxiety and is facing financial hardship as a result of the Incident, and also in part as a result of this offence. Mr. Graf treaded on M.G.'s vulnerability and kindness. He was reckless in his actions with no regard for a person he claimed to care about.
- [52] Additional aggravating factors and circumstances include that the harassment occurred over approximately four months. The communications consisted of 22 messages and emails, as well as a gift certificate to McDonald's - the restaurant they attended on the evening of the non-consensual sexual incident - sent to her at her father's office. Communications continued after M.G. told Mr. Graf to stop contacting her and to delete her number. In one message, he acknowledged to her that he knows she no longer receives his messages, but he said he finds it therapeutic to keep messaging her. His failure to stop writing after her requests to cease and desist exacerbated M.G.'s feeling that her "no" was powerless. Mr. Graf also stated that he would not delete her number because he wanted to reflect on the past. He

tried to bait and goad her into responding to him to continue their relationship. Significantly, Mr. Graf's tone changed when he publicly demeaned and insulted M.G. on Facebook. This elevates the gravity of the offence and Mr. Graf's degree of responsibility. The change in tone to one first of criticism, calling her cruel and abusive, and then public rebuke also shows a lack of any meaningful insight into his conduct at the time.

- [53] M.G. was very vulnerable, and Mr. Graf knew that. She is kind, having supported him previously through his alcoholism and mental health issues. In the one-way communications he recognized and preyed on M.G.'s selfless and susceptible character.
- [54] In mitigation, it is an important factor that Mr. Graf entered a guilty plea prior to trial, saving M.G. from having to testify, from being cross-examined, and from the anxiety of an unknown outcome. This is indicative of remorse and reflects his acknowledgement of responsibility. Mr. Graf also expressed his remorse in a letter and statement to the Court. However, these are his only expressions of remorse since the offence.
- [55] I am also mindful of the principle of rehabilitation as Mr. Graf made some efforts and showed progress after the Incident. He has taken some steps to address his mental health and alcohol addiction although there has not been an ongoing demonstrable commitment to his recovery.
- [56] Further, the harassing emails continued while he was at the treatment facility. During the time he was there he also arranged for the gifts to be sent to M.G.'s father's office. After release on July 12 he continued the harassment for three further months. I do not conclude that the month of treatment assisted him with insight into the harassing behaviour.
- [57] However, after four months the unwanted communication ceased, although it had continued after M.G. specifically requested no more contact. The harassing conduct ended before the involvement of the police thus indicating some insight into his behaviour.
- [58] Again, Mr. Graf has no criminal record, and he was not bound by any court or common law orders when he committed the offence. There were no breaches while on bail, and Mr. Graf has the support of his children and friends.

A. Sentence

- [59] The Crown seeks a jail sentence. However, noting particularly the cases of *Settle* and *R. v. Kapoor*, 2012 ABPC 299, I do not find that jail in these circumstances is a fit sentence. The aggravating factors present when jail has been imposed, including threats of violence and stalking, for example, are not present here: *Myers*; *Settle*; *Kapoor*; *Bates*; *Taylor*; *R. v. Fox*, 2017 BCSC 2361; *R. v. Lynch*, 2017 BCPC 172; *R. v. Fader*, 2014 BCPC 327; *R. v. Cooper*, 2009 BCCA 208; *R. v. J.R.I.*, 2002 BCPC 711; *R. v. Khemhus*, [1994] B.C.J. No. 3050 (C.A.). I am bound by that case law.
- [60] Mr. Graf seeks a conditional discharge.

- [61] Section 730 permits a court to, "if it considers it to be in the best interests of the accused and not contrary to the public interest, direct that the offender be discharged".
- [62] *R. v. Fallowfield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.) at 454-455, remains the definitive case regarding discharges:
- (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
 - (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
 - (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
 - (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
 - (7) The powers given by s. [730] should not be exercised as an alternative to probation or suspended sentence.
- [63] I find that a discharge is in Mr. Graf's best interest. A conviction will have an adverse impact on him as it would with any first-time offender.
- [64] With respect to public interest, the objectives of denunciation and general deterrence are paramount: *Myers* at para. 58. I repeat here the passage from *Bates*, where Moldaver J.A. (as he then was) of the Court of Appeal for Ontario cited and endorsed the Court of Appeal for P.E.I. judgment in *Wall*:

The very unsettling aspect of dealing with these offences in the criminal justice system is that, undoubtedly, many offenders will be presenting themselves with no criminal record and with the reputation of being both a good family and community person. The other unsettling aspect of these cases is that if the pattern of harassing conduct continues and is not properly dealt with by the sentence imposed, the result could be very serious physical and/or emotional harm to the victim. In passing sentence trial judges must, therefore, be wary of positive pre-sentence reports depicting the offender as a person whose actions, in respect to the offence, are entirely out of character. The fact an offender shows any propensity toward this kind of conduct, regardless of his unblemished past, is cause for great concern and for a very careful and judicious approach to sentencing. Factors such as the absence of a prior criminal record and expressions of remorse, which must necessarily be considered on sentencing, should not be given undue weight in the sentencing of this offence.

The focus of sentences must be to send a message to the offender, and the public, that harassing conduct against innocent and vulnerable victims is not tolerated by society and most importantly, the Court must insure, as best it can, that the conduct of the offender never happens again recognizing that, if it does, a far more serious offence could be committed. The principles of sentencing must be applied with this focus squarely in mind.

- [65] In this case, the circumstances are similar. Mr. Graf is a first-time offender with the support of his family and friends. The offence he committed is one committed in secret, in the shadows. Only M.G. knew what he was doing in repeatedly harassing her on an increasing scale of anger and disrespect. To say that he has had other respectful relationships is not mitigating; it is not an acknowledgement of harmful actions taken by Mr. Graf and harmful effects on M.G.
- [66] I do not find that the public interest can be served by the imposition of a discharge. In other words, a discharge is contrary to the public interest.
- [67] I rely on the cases of Owen at paras. 17-20; Settle at paras. 113-144; and Kubinec at paras. 21-22 rejecting conditional discharges. I distinguish the case of R. v. Whelan, 2015 NBCA 67. In Whelan, there were exceptional circumstances that lead the Court of Appeal for New Brunswick to conclude that it would not be contrary to the public interest to grant a conditional discharge. The offender was under treatment for mental illness, and the offending conduct ended months before the charges were brought: Whelan at paras. 14 and 15. I do not find here similarly exceptional circumstances. Other than a reference to a recent mental health visit to a doctor, Mr. Graf has taken no steps since July 2017 to address his alcohol and mental health issues with therapy or treatment. Although he discontinued the harassing behaviour by the time police were involved, the harassing conduct continued for three months after he was released from the residential treatment facility.
- [68] Mr. Graf's offence has a statutorily deemed aggravating factor. His moral culpability is high. The circumstances of the offender, the offence, and its impact on the victim do not lead me to conclude that a discharge is a fit sentence. A discharge, in my view, would not adequately address the sentencing principles of denunciation and deterrence.

X. Conclusion and Orders Sought

- [69] Mr. Graf, please stand sir.

A. Sentence

- [70] Taking into account the totality of the circumstances of the offence and your circumstances, and the principles of sentencing as applied in the case law, I therefore suspend the passing of sentence and place you on probation for two years.
- [71] The terms include protective and rehabilitative conditions.
- [72] The terms of the probation order are:

Condition 1: Keep the peace and be of good behaviour.

Condition 2: You must appear before the court when required to do so by the court.

Condition 3: Notify the court or the supervisor In advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

Condition 4: You must have no contact or communication, directly or indirectly, with M.D. aka M.G.; L.G., R.G.; R.G. aka R.B.

Condition 5: You must not go to any place where M.D. aka M.G. lives, works, attends school, or worships, or happens to be. If you see her, you must leave her presence immediately without any words or gestures.

Condition 6: You must not distribute, publish, post, or make publicly available, in any way, any information, including comments and Images, which refer to or depict M.G. You must remove and permanently delete from your cell phone, computer and email accounts, any contact information and messages to any connections with M.G., and within 2 days, you must take all necessary steps to remove from the internet, including all websites and social media pages, any words, images, comments that you have posted that refer to or depict M.G.

Condition 7: You are to report to a Probation Officer at 275 East Cordova Street, Vancouver, BC by telephone @ 604-660-3777 by 3:00 p.m. tomorrow. If the office is closed, you must continue calling daily during regular business hours until you have spoken to a probation officer and received further direction to report. After that, you must report as directed by your probation officer which may include in person reporting.

Condition 8: When first reporting to your probation officer, you must provide them with the address where you live and your phone number. You must not change your address or phone number without notifying your officer in writing at least 2 business days in advance of any change.

Condition 9: You must attend, participate in and successfully complete any intake, assessment, counselling, or education program as directed by your Probation Officer. This may include counselling or programming for alcohol or drug addiction; mental health, and suicidal Ideation; respectful relationships; and sexual offence prevention.

Condition 10: Having consented in court, you must sign any documents that are necessary for your probation officer, counsellors, or treatment providers to check on your attendance and completion of any intake assessment, counselling, or education program.

Condition 11: You must complete 60 hours of community work service under the direction of your probation officer. Your community work service must be completed within the first 6 months of the commencement of this probation order.

Condition 12: Your reporting ends when you have satisfied your probation officer that you have completed all your community work service, completed all your counselling and treatment, or that It is not required, and your probation officer has told you that you are no longer required to report.

Condition 13: You must not possess, directly or indirectly, any weapon as defined in s. 2 of the Criminal Code, including: a) firearms and ammunition; b) cross-bows, prohibited or restricted weapons or devices, or explosive substances; c) anything used, designed to be used or intended for use in causing death or injury to any person, or to threaten or Intimidate any person; d) any imitation of all the above, including any compressed air guns or BB/pellet guns; e) any related authorizations, licences and registration certificates, and you must not apply for any of these.

B. DNA Order: s. 487.051(3) Criminal Code

[73] Pursuant to s. 487.051(3) of the Criminal Code, criminal harassment is a secondary designated offence. There will be an order that Mr. Graf provide a sample of his DNA for inclusion in the national forensic databank.

[74] The offence of criminal harassment is a serious offence. This is indicated by Parliament setting the maximum sentence at a high level (10 years) and removing the availability of a conditional sentence order when prosecuted by indictment. In the circumstances of this case, a DNA order would accord with the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest, and conviction of offenders.

C. Firearms Prohibition: s. 109

[75] For the duration of the prohibition, pursuant to ss. 109(2)(a) and 109(2)(b) of the Criminal Code, on Mr. Graf's first conviction the Crown seeks and I order:

- (a) for 10 years, an order prohibiting him from possessing the items enumerated in s. 109(2)(a) [any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance] (the minimum length is 10 years in the case of a first conviction); and
- (b) for life, an order prohibiting him from possessing the items enumerated in s. 109(2)(b) [any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition] (the mandatory length is life in the case of a first conviction).

[76] Mr. Graf, I repeat here that there is to be no contact with M.G. and her family for the two years of probation. However, I would add as an observation that it would be beneficial for all concerned if you took that prohibition to be one lasting a very long time. I am not so ordering but strongly recommending, after hearing the evidence in this sentencing, that you have no further contact ever.

"The Honourable Madam Justice Watchuk"

Appendix "A"

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