PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. S.J.P.*, 2016 NSPC 50

Date: 2016-07-21
Docket: 2788031, 2788032
Registry: Sydney

Between:

The Queen

v.

R. v. S.J.P.

[Editorial Notice: Identifying information has been removed from this electronic version of the judgment]

Restriction on Publication: s.486.4 C.C.C.

Judge:	The Honourable Judge A. Peter Ross
Heard:	July 23, 2015, et. seq. in Sydney, Nova Scotia
Decision	July 21, 2016
Charge:	s. 151 (a) of the Criminal Code, s. 271 of the Criminal Code
Counsel:	Darlene MacRury, for the Defence Darcy MacPherson, for the Crown

Court summary:

The accused was convicted of sexual interference against his [toddler] […] daughter. He rubbed himself against the child for a brief time, through clothing.

The Crown proceeded by indictment, thus invoking a mandatory minimum sentence of one year in prison for this s.151(a) offence.

The accused is of aboriginal descent, a Mi'kmaq, with no prior criminal record. A pre-sentence report and a Gladue report were prepared, describing his background and personal circumstances. There were no indications of any such behavior at any other time.

The defence contended that the mandatory minimum sentence was grossly disproportionate to a fit and proportionate sentence, a violation of the accused's s.12 Charter right, entitling him to relief under s.24(1). While s.7 and s.15 of the Charter were raised, and improper exercise of the Crown's discretion in deciding to proceed by Indictment, there was no proper support for such arguments and these applications were not considered. In any event, the decision to proceed by Indictment did not automatically "scale up" the sentence which the accused should receive (absent the mandatory minimum).

Despite the leeway accorded to trial judges by R. v. Lloyd (SCC) the court only dealt with the s.12 issue because it had an actual bearing on the sentence which S.J.P. should receive. It would have declined to consider the application purely on the basis of a hypothetical scenario.

The status of the accused as an aboriginal offender was entitled to consideration. In addition to the nature and circumstances of the offence, the circumstances of the offender were of central importance. The *Gladue* report was relevant in this sense, even though there was nothing before the court to directly connect this type of behavior to aboriginal offenders or to S.J.P.'s community.

An extensive survey of case law resulted in a determination that a fit and appropriate range of sentence, following the approach mandated in R. v. Lloyd, was 3 to 5 months imprisonment. The fact that the victim did not suffer any physical, emotional or psychological harm was taken into consideration. The possibility of recitivism could be addressed in other sentence orders which would be imposed together with the jail sentence.

To the extent that the enactment of the mandatory minimum sentence created an "inflationary floor", the court gave effect to Parliament's expression by choosing the higher end of the fit and appropriate range of sentence. Therefore the

proportionate sentence for S.J.P., absent the mandatory minimum provision, was 5 months imprisonment. The mandatory minimum, being more than twice this length, was found to be grossly disproportionate. The mandatory one-year sentence thus constituted a violation of S.J.P.'s s.12 right not to be subject to cruel and unusual punishment.

By the Court:

DECISION ON CHARTER APPLICATION

Introduction

[1] This is a decision on a Charter challenge to a mandatory minimum penalty (MMP) as it pertains to the sentencing of a man found guilty of sexual interference with a child. The phrase "mandatory minimum sentence" may be more appropriate, but I will employ the acronym MMP hereafter.

[2] The accused, S.J.P., is a 41 year old man who committed sexual assault and sexual interference against his [toddler] daughter, M. As both charges arise from

the same conduct I am entering a conviction on the sexual interference charge (s.151) and a stay of proceedings on the sexual assault (s.271). It appears most courts in the same situation have done likewise (as noted in case summaries, below) although some have done the opposite (see for example R. v. J.O., below).

[3] Little depends upon which charge proceeds to sentence. The MMP is the same for each, given the age of the victim. The potential sentence does not approach the possible maximum for either. Sexual interference is a better fit for the facts. This decision would yield the same result had I done the opposite and proceeded to sentence on the charge of sexual assault.

The Facts

[4] The reasons for decision at trial were delivered orally and are unreported. I will outline the facts as I found them.

[5] The accused S.J.P. and S.P. began a relationship in 2008. They had three children who were aged […] on the date in question. M. is the youngest. Despite having separated the previous year the accused and S.P. maintained contact, and it appears the accused was on good terms with her and the children.

[6] On the date in question S.P. was in hospital […]. There were medical complications. The accused came to her residence to help with the children, as he had done throughout her […].

[7] D.J. is S.P.'s younger sister. She also came to help while S.P. was in hospital. D.J. minded the children at the home in the early part of the day. At approximately 4:00 p.m. she left them with the accused and went to the hospital to visit S.P. The accused purchased some beer and consumed between 7 and 11 regular cans by the time D.J. returned. What D.J. witnessed when she got back comprised the only evidence against the accused. While the accused gave another possible explanation for what D.J. observed, and firmly denied that he had committed any sort of sexual misconduct, I found the facts to be as D.J. described them.

[8] D.J. returned between 8:30 and 9:00 p.m. She let herself in. The children knew she was there. The accused was asleep on the couch in the living room, fully dressed in jeans and a t-shirt. The TV was on. D.J. asked the children to wake him up, and went to the kitchen. She was upset to see the empty beer cans. She returned to the living room. Although she was but three feet away from the accused he was seemingly unaware of her presence. M. was trying to wake her father up. He was lying on his side. She was standing by his head, wearing a

disposable diaper. She was [a toddler] […]. The accused took hold of M. with his right arm, lifted her from the floor and "tucked her into his body." He brought her belly up to his groin and began to rub himself against her, moaning as he did. He said her name.

[9] As D.J. described it the accused was moving his body "towards" the child. She described it as "dry-humping" which to her meant "sex without penetration." While this was going on the other two children played on the floor, saying "dad, wake up." D.J. watched for only a few seconds before going back to the kitchen in shock at what she had witnessed. After a few moments in the kitchen thinking about what to do, she went back to the living room. M. was no longer on the couch with the accused. D.J. yelled his name, at which point "his eyes went wide open." Only then did the accused know that she was there. She confronted him about his drinking, but not about the sexual act. She left the residence, contacted family members, returned to the residence to retrieve the children, and took them to her mother's for the night.

[10] D.J. described the accused as "passed out drunk". The Crown has submitted that the drinking, the self-induced intoxication, is an aggravating factor. I am unable to make any clearer finding of fact than to say, as above, that the accused consumed between 7 and 11 beer. It also appears, on the evidence, that he spent a

considerable part of the previous night at hospital with S.P., returned to the home in the morning, and then slept for a time. It is distinctly possible that both the sleep disruption and the drinking contributed to the fact that he dozed off on the couch.

[11] The Crown submitted that the accused touched the victim with his penis. It should be remembered that this "touching" was through his own clothing, and as regards the genital area of the child (to the extent that it matters) through the child's diaper as well.

The Mental State of the Accused

[12] Impliedly I found that the accused had the requisite *mens rea* for the offence; it was not argued otherwise. It appears that the accused, having been roused from his sleep, found himself aroused in a different sense, and found in his young child a means by which to indulge this desire.

[13] The phrase "for a sexual purpose" in s.151 makes it a specific intent offence. Having the requisite intent does not mean that the accused's cognitive functions, inhibitions, judgement, etc. were operating at the highest level. On the facts before me, the accused's purpose was momentary sexual gratification. His thinking was clouded by alcohol, or lack of sleep, or both. All the same, the accused's actions

are as shocking to a reader or listener as they were to D.J., and one cannot help but wonder whether they are indicative of other behaviors or propensities.

The Defence Application

[14] In this case the Crown proceeded by Indictment. The accused elected trial before a provincial court judge. I found him guilty, despite his sworn denial. Defence has now made application for Charter relief under s.24(1) on the basis that the one-year MMP enacted by Parliament for this offence (where Crown proceeds by Indictment) is a violation of S.J.P.'s s.12 guarantee against cruel and unusual punishment.

[15] Crown opposes the application, but acknowledges that should the court find a breach of S.J.P.'S s.12 right, such breach would not be saved by s.1 of the Charter.

[16] Defence argued peripherally that S.J.P.'s s.7 right has also been violated. There is support in legal academic circles, at least, for the idea that courts should approach MMP's with an eye to principles of fundamental justice. However, the Supreme Court instructs me to consider the issue under s.12.

[17] Defence also suggested that the MMP may be a breach of the accused's s.15 Charter right to equal treatment, given that he is of aboriginal ancestry. I noted on the record at the close of submissions that this argument was not fully developed and was not properly "before the court". Hence I will not address s.15.

[18] Confining the issue to s.12 makes the matter less complicated, but hardly less difficult.

The Crown Election

[19] Had the Crown elected to proceed by summary conviction, the MMP would be 90 days. This, defence counsel submits, would be an appropriate sentence. Because the Crown proceeded by Indictment the MMP goes from 90 days to one year on the same set of facts. (This procedure also gave the accused the right to elect a trial by jury, although he ultimately chose trial in provincial court.) The Defence faulted the Crown for how it used its discretion: this has provoked a concerted response from the Crown. Again, however, Defence has not presented a proper application for a stay of proceedings based on Crown misconduct. I thus find it unnecessary to consider R. v. Anderson [2014] S.C.J. No.41, R. v. Fitzgerald [2013] N.S.J. No. 725 or other cases which deal with potential abuse of the Crown's prosecutorial discretion.

[20] In a sense the foregoing issue is moot, for in R. v. Solowan 2008 SCC 62 the Supreme Court said that whether the Crown proceeds by Indictment or by Summary Conviction, the sentence should be determined by applying the principles of sentence set out in the Criminal Code. At par.15 Fish, J. states:

> A fit sentence for a hybrid offence is neither a function nor a fraction of the sentence that might have been imposed had the Crown elected to proceed otherwise than it did. More particularly, the sentence for a hybrid offence prosecuted summarily should not be "scaled down" from the maximum on summary conviction simply because the defendant would likely have received less than the maximum had he or she been prosecuted by indictment. *Likewise, upon indictment, the sentence should not be "scaled up" from the sentence that the accused might well have received if prosecuted by summary conviction.* (emphasis added)

[21] Had the Crown proceeded by summary conviction the maximum available sentence would be 18 months, which is well within the range of sentence it seeks for S.J.P. I will later discuss the so-called “inflationary floor” which may be a result of the legislated MMP, but this is not quite the same issue as whether the Crown’s election *per se* should have a bearing on what is fit and appropriate according to standard sentencing principles.

The Law Respecting Mandatory Minimums / s.12

[22] The common law allows for a natural evolution of the law on sentencing, within parameters set by Parliament. Historically these parameters have been very

broad, leaving the common law ample room to take account of changing societal norms. Crimes of domestic violence, crimes against children, have all seen a general upward trend in the severity of sentences. Arguably certain property-related offences saw an opposite trend. Some would say that this evolution takes too long. Parliament has sometimes found it necessary to enact abrupt changes.

[23] In R. v. Nur, 2015 SCC 15 the Supreme Court said:

> 44 Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.
>
> 45 General deterrence -- using sentencing to send a message to discourage others from offending -- is relevant. But it cannot, without more, sanitize a sentence against gross disproportionality: "General deterrence can support a sentence which is more severe while still within the range of punishments that are not cruel and unusual" (*R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 45, per Gonthier J.). Put simply, a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending.

> 46 To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the *Charter* involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.

[24] R. v. Lloyd [2016] S.C.J. No. 13 is the most recent decision of the Supreme Court on mandatory minimum sentences. It concerned a MMP of one year for a drug crime. It governs my approach to the issue even though I am dealing with a different type of offence.

[25] *Lloyd* makes clear that provincial court judges have the power to determine the constitutionality of a law as it concerns the case before them. They do not have the authority to make broad declarations of unconstitutionality under s.52 – to "strike a law down" as it were – but may grant Charter relief under s.24 where the application of the law violates the Charter right of the accused in the particular case. It suggests that the issue of MMP's is properly dealt with under s.12 of the Charter, rather than s.7.

[26] Commencing at par.22 the court describes the analytical framework for determining whether a sentence constitutes a "cruel and unusual punishment"

under s.12. Referring to its recent decision in *Nur*, it notes that "a sentence will infringe s.12 if it is 'grossly disproportionate' to the punishment that is appropriate, giving regard to the nature of the offence and the circumstances of the offender." It states that "a law will violate s.12 if it imposes a grossly disproportionate sentence on the individual before the court, *or* if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others." In R. v. E.M.Q. [2015] B.C.J. No.229 (and possibly elsewhere) these are referred to as the "particularized inquiry" and the "hypothetical inquiry" respectively.

[27] *Lloyd* thus affords judges the leeway to make a ruling on a s.12 application even though the result of the ruling will have no bearing on the actual sentence to be imposed on the offender before the court. Such a ruling may hold some persuasive value, but unless appealed and given the imprimatur of an appeal court it will have no binding effect. The law itself is still considered to be in force. In *Lloyd* the Supreme Court notes that judges may decline to engage in this hypothetical inquiry for reasons of judicial economy: "judges should not squander time and resources on matters they need not decide." This comment recommends itself to me. If this decision had no impact on the actual sentence to be imposed on S.J.P., I would not be making it. If it had no impact on this accused, it would be a ruling in search of a remedy.

[28] At par.23 and 24 of *Lloyd* the Court outlines the steps and tests applicable to a s.12 challenge. First, the court must first determine what constitutes a "proportionate sentence" for the offence having regard to the objectives and principles of sentencing. This need only entail a consideration of the "rough scale of the appropriate sentence." Second, the court must ask whether the MMP requires the judge to impose a sentence which is grossly disproportionate to the "proportionate sentence" so-determined. The question becomes: "In view of the fit and proportionate sentence for the offence and offender, is the mandatory minimum sentence grossly disproportionate?" To be grossly disproportionate a sentence must not merely be excessive, but be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society.

[29] To sum up, the question I must answer is whether, within the confines of this case, the application of the MMP would be a breach of S.J.P.'s individual right not to be subject to cruel and unusual punishment. One year may not be at all cruel or unusual for certain offences a person might commit. The meaning of "cruel and unusual" derives from the application of the proposed sentence in the circumstances of the particular case. In turn this involves a consideration of where the offending behavior falls within the range of behaviors which fit the definition of the crime. In other words is it "high end" or "low end" among the many

possible ways that a person may commit the offence of sexual interference? The circumstances of the offender must also be taken into account in determining whether a proposed sentence is "cruel and unusual". Having a prior related record, for instance, would be highly relevant.

The "Inflationary Floor"

[30] Various courts have used the phrase "inflationary floor" to describe the impact of an MMP on the appropriate sentence range for that particular offence.

[31] In R. v. Morrissey [2000] S.C.J. No.39 the Supreme Court noted that the creation of a four year MMP for criminal negligence causing death with a firearm would create a "floor" which would have an inflationary effect on all penalties for this offence, with fewer instances in which four years would be deemed grossly disproportionate.

[32] In R. v. Skinner [2015] N.S.J. No. 220 Derrick, J., following *Morrisey*, supra, considered the 5 year MMP for that offence (discharging a firearm with intent to endanger life – s.244) to be an "inflationary floor". As such, it would be the sentence the "best offender" might expect. It thus impacted on the sentence Mr. Skinner should receive, which was determined to be 5.5 years. In that case there was no s.12 challenge to the MMP itself.

[33] In R. v. Moazami [2015] B.C.J. No. 2441 (BCSC) the accused had been convicted of a number of offences against children. The court said at par.18 that it should take into account the inflationary impact of a MMP on the appropriate range of sentence for such offences.

[34] In R. v. Keough [2012] A.J. No.10 (ABCA) the court said, with reference to the enactment of a 45 day MMP for possession of child pornography, that the main purpose was to eliminate the prospect of a conditional sentence – the minimums mandating more onerous sentences, but not necessarily longer sentences (at par.34).

[35] In R. v. King [2013] A.J. No.3 the Alberta Court of Appeal noted that a one-year MMP had come into effect as of the date of Mr. King's sentence appeal. This in turn affected what sentence he should receive – what sentence would then be fit and appropriate. While the MMP (given its effective date) did not bind the court as to Mr. King's sentence, the court said at par.20 that it "need not be oblivious to what it suggests about Parliament's view of the gravity of such offences from now on".

[36] Absent a Charter challenge, the MMP theoretically defines the sentence for the "best possible offender". I have no criminological data before me to indicate

the actual effect of MMP's on sentences generally. Intuitively I suspect that some judges will, in effect, "collapse" lower-end offences at the MMP, even as the broader range of offending behavior gets pushed into higher numbers.

[37] In my s.12 analysis I will give effect to the "inflationary floor" idea by first determining what a fit and appropriate *range* of sentence would be for S.J.P.'s behavior *absent the MMP* (in accordance with the first step in the Lloyd analysis, above). Next, acknowledging that Parliament has spoken about the seriousness of such crimes, when proceeding to the second step in the Lloyd analysis, I will settle on the upper end of that range as the comparator to the MMP.

Circumstances of the Offender / Background

[38] A pre-sentence report was prepared, and a *Gladue* report. Consequently I now know a great deal more about S.J.P.'s background and personal circumstances.

[39] He is 41, born in […] Cape Breton. He reported having […] siblings and half-siblings, some of whom he has never met. His parents separated when he was only 1.5 years old and he has had no subsequent contact with his father. His mother relinquished custody of him as a toddler. He was lived with an adopting family and changed residences from time to time. At 16 he went to live with his

biological grandparents. He admires and feels close to his grandfather who he described as "hard-working", a quality which he learned from him. He played sports as a child and worked in a basket shop. He was not abused in any sense as a child but did witness alcohol abuse by other family members.

[40] His grandmother described the offender as "a good boy" who did not cause trouble and was a good student. She said he is an excellent father and has never been suspected of sexual abuse or other inappropriate behavior.

[41] An aunt said that S.J.P. did not drink when younger. She confirmed that he is currently a great help to his ailing mother who has cancer and is undergoing chemotherapy. The aunt also describes him as a dedicated father.

[42] S.J.P. has three children by an early relationship, begun as a teenager. They are now […]. Evidently he is on good terms with them and used to take these children to live with him every other weekend. The mother of these children says that she never had any suspicions of inappropriate behavior. Since these offences arose she questioned her children about the possibility of such, but nothing was disclosed.

[43] S.J.P. then developed a long-term relationship with M.'s mother, S.P. As noted above they also separated prior to this offence, although he says he often

travelled from […] to help with the children and with chores around the house. He is now involved in a third relationship with a lady who has two grown children.

[44] Until recently the accused earned his living as a fisherman. He was injured on-board […] and has thus not worked in three years. His captain described him as a good worker who related well to the other crew, saying "you could not ask for any better". At present he relies on social assistance. He is an avid guitar player.

[45] He denies having any issues with alcohol or drugs. Aside from his […] injury at work he is in good health. He speaks Mi'kmaq. He says he is kind and has many friends. Of D.J., he cannot see "why she would say this – it's not me." He denies the conduct in question. He says he misses his children and wants to be able to see them again. He is proud of his heritage […]. After high school he did the […] through Canada and the U.S. In adulthood he has spent time in […] and […]. He left school after Grade IX, but later achieved a […]certification, and related training certificates. He has at various times worked at logging, on a pipeline project, and as a fisherman.

[46] The accused's father was raised in a very abusive environment, but for the brief period he was a father to the accused, he was good to him. His mother says she had no choice but to place the accused with other families from time to time.

By far the most long-term and significant living arrangement was in the household of J.P. who was college-educated, […].

[47] I will not attempt to summarize the broader family background nor the historical development of the three First Nations communities where he has lived. While these communities are afflicted with substance abuse, family deterioration and low incomes and employment, where many lacked parenting skills because of the residential school experience, there is no clear connection between these broad features, the particular circumstances of this offender's life and upbringing, and sexual interference with children. Upon review of the material which has been provided, the offending behavior does not emerge from his personal and community history in the way that other criminal behaviors sometimes do.

Isolated Incident

[48] The Crown concedes that this is a single-incident case. There have been no disclosures of any such behavior vis-à-vis M. or any other child. However the Crown also argues that purely by chance an early indication of deviant behavior has been revealed. It contends that the court has an obligation to protect young people from such behavior and that the mere fact that the accused was "caught" early-on should not entitle him to leniency.

[49] I have no psychological assessment to put S.J.P.'s actions into broader context. I do not have an expert opinion about his sexual predilections, or what risk there may be of reoffending.

[50] Other courts at all levels have clearly factored the number of incidents, or duration of the offending behavior, into their sentence calculations.

[51] There are multiple aspects to this sentencing. He is liable to be subject to various conditions, prohibitions, SOIRA registration, supervision, etc. Some of these sentence orders address the aspect of recidivism. With respect to the incarceration component of his punishment, I believe this must be informed only to the conduct which has been proven – the single incident described above.

The Status of the Accused as an Aboriginal Offender

[52] S.718.2(e) of the Criminal Code requires sentencing courts to consider all available sanctions other than imprisonment that are reasonable in the circumstances, particularly when dealing with aboriginal offenders. S.J.P. is an aboriginal defender.

[53] Crown argues that the creation of a MMP for s.151 means that a non-custodial sentence, or a short period of incarceration (below one year) are simply

not "available" (in the words of the section) and that ipso facto s.718.2(e) has no application. This line of thought would effectively negate the importance of *Gladue* factors at any stage of analysis.

[54] In the alternative the Crown submits that s.718.2(e) is a legislated right, not a constitutional right, i.e. one which is guaranteed by the Criminal Code, not the Charter. This distinction was drawn in R. v. MacKenzie [2004] N.S.J. No. 23 (NSCA). It submits that S.J.P.'s aboriginal status should not bear on the constitutional question simply because it is a legislated factor on sentencing.

[55] S.15 of the Charter guarantees to every individual the right to equal protection and benefit under the law, without discrimination based on race or national or ethnic origin. Defence submitted that the MMP violated S.J.P.'s s.15 right but, as I have noted above, did not develop the argument further. It referred me to R. v. T.M.B, 2013 ONSC 4019. That case concerned a s.7 and s.15 Charter challenge. Notably it did not concern s.12. There, a considerable body of evidence was presented including five expert witnesses (two of whom were aboriginal elders) and a large volume of social science material. I have nothing even remotely comparable by which to assess an alleged s.15 breach, and this was acknowledged by counsel towards the close of submissions.

[56] These arguments, from counsel on opposite sides, call upon me, although in different ways, to determine whether and how S.J.P.'s aboriginal status should be factored into this decision. The Supreme Court's decision in *Gladue* is relevant not only to whether imprisonment is warranted for an aboriginal offender, but also as to the length of imprisonment in cases where, as here, some period of incarceration is clearly called for.

[57] I think S.J.P.'s status as a First Nations person must not be ignored, even if this does not form the primary basis for the Charter challenge. Sentencing is an individualized process, and S.J.P.'s ancestry is integral to the person he is. The proper approach is to consider what sentence the accused would receive, all things considered, in the absence of a MMP, and then proceed to a determination of whether the mandated sentence is grossly disproportionate. That said, there is nothing before me to explain how sexual offences against children are viewed in First Nations communities, nor whether such conduct is more or less common than in non-native society, nor how such behaviors may be the indirect result of historical events, nor whether there is a lesser (or greater) need for incarceration as an expression of denunciation and deterrence.

Cases Concerning the Range of Sentence

[58] Here I embark on the first step of the *Lloyd* analysis, described in par. [28], above. At this stage I am attempting to determine a fit and appropriate (or "proportionate" if you will) range of sentence for S.J.P. At this stage the potentially *binding* effect of the MMP is put aside, but Parliament's pronouncement on the seriousness of the conduct is not completely ignored.

[59] Although there are many reported cases, one never expects to find another case which is identical to the one under consideration. The circumstances of each case, and accused, are unique. The search for common threads is particularly challenging here, given the age of the victim and the peculiar manner in which she was abused.

[60] Defence submits that a jail sentence of 45 to 90 days would be fit and appropriate. Crown submits that the range of sentence it would recommend in the absence of the MMP is 4 to 8 months. It says the one year MMP is not grossly disproportionate to this range. It says that Parliament's decree must therefore be respected and observed.

[61] As noted, there are many reported cases on sexual exploitation of children. It is hard to know whether this bears any relationship to the incidence of child sexual abuse in Canada. It may simply be a reflection of the seriousness of the

subject and the difficulty that judges experience in attempting to fashion, and publically justify, fit and appropriate sentences.

[62] Given the plethora of reported decisions I must be selective. A trial judge will inevitably have an initial impression of the appropriate sentence in a given case. This creates a danger of "confirmation bias". I have focused primarily (not exclusively) on cases where sentences from three months to one year were imposed. I have tried to avoid confirmation bias in choosing which cases to mention.

[63] *R. v. E.M.Q. [2015] B.C.J. No.229 (BCSC) – 9 months (13 months in the result).* This case is similar in many respects to S.J.P.'s. The accused was convicted on charges of sexual assault and sexual interference. The s.271 charge was stayed on *Keinapple* principles.

[64] The proceedings were by Indictment, making the MMP penalty for the s.151 offence one year. Crown argued for a 15 month sentence of imprisonment. Defence argued that in the absence of the MMP an appropriate range of sentence would be 60 to 90 days in jail.

[65] The 14 year old victim had agreed to babysit the daughter of the accused and one C.M. Near midnight on the date in question the victim went to a home on the

Nemiah Reserve where the accused, C.M. and their daughter were staying. The accused and C.M. left to attend a party where they consumed alcohol. Upon returning to their home, they put their baby daughter to bed and then retired to the basement of the house. The victim fell asleep on the upstairs couch. Later, the accused came up to the living room, woke the victim and asked to kiss her. She refused. The accused wrestled with her, attempted to touch her breasts and vagina and succeeded in touching her pelvic area over her clothing. The incident ended when C.M. came upstairs and the victim locked herself in the bathroom. At the time the accused was on a condition not to contact C.M. He was 21 years old.

[66] The incident had a significant impact on the victim who described her fear of being left alone, stigmatization by some members of her community, and her tendency to blame herself for what happened. She had difficulty making new friends and enjoying a normal teenage life.

[67] The accused was a member of a First Nations community. Both a pre-sentence report and a *Gladue* report were prepared and considered. The circumstances of the offender are set out in par. 24 et seq. He had a minor record for breaches of court orders. The court noted that in cases involving serious offences where there is a pressing need for denunciation and deterrence, such as sexual assaults of children by people in a position of trust, both aboriginal and non-

aboriginal offenders will generally receive sentences of imprisonment. The court referred to R. v. R.R.M. 2009 BCCA 578 at par.24 as follows:

> The sentencing of Aboriginal offenders for serious sexual assaults, where there is evidence that they have suffered from historical and systemic abuses, is not an easy task. This Court has observed that in sentencing Aboriginal offenders, while judges must be "sensitive to the conditions, needs and understandings of Aboriginal offenders and communities, this does not mean that sentences for such offenders will necessarily focus solely on restorative objectives or give less weight to conventional sentencing objectives such as deterrence and denunciation." See *R. v. Morris*, 2004 BCCA 305 at para. 55, 186 C.C.C. (3d) 549. Chief Justice Finch further noted at para. 53 that *Gladue* made clear that it was not the principles of sentence that varied in sentencing Aboriginal offenders but the application of those principles to a particular case. In *Gladue* (at para. 80), the Court further stated that:
>
> > As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or case-by-case) basis: for *this* offence, committed by *this* offender, harming *this* victim, in *this* community, what is the appropriate sanction under the *Criminal Code*?

[68] At par. 52 et seq Pearlman, J. deals with the constitutional challenge to the MMP. At that time *Lloyd* had been decided by the BCCA; the appeal to the SCC was pending. At par. 59 the court begins by analyzing the case law to determine what the range of sentence was for the offence prior to the enactment of the MMP so as to determine whether the MMP had an appreciable effect on that range. Numerous cases are summarized and compared. The court found R. v. A.B. 2013 SKQB 56 and R. v. William 2014 BCSC 1639 particularly instructive.

[69] In *A.B.* the 33 year old accused crawled into the victim's bedroom where he rubbed her in various places, then followed her to another room, over her protests, where he repeatedly kissed and hugged her. He was assessed at high risk to reoffend. He received nine months imprisonment. In *William* the aboriginal offender received one year for digital penetration and forced non-consensual intercourse. The victim there suffered significant psychological trauma. The accused had no prior record; various Gladue factors were mentioned.

[70] At par. 83 *et seq* of *E.M.Q.* the court noted that sexual interference by touching through clothing falls on the lower range of the conduct caught by s.151. However it also noted that the fact the conduct occurred while the victim was sleeping, and the significant emotional impact of the offence on the victim were aggravating factors. At par. 90 the court states that absent the MMP a sentence of 9 months would be called for. Then, in the context of a one-year MMP, because the accused was not the "very best offender", a 13 month sentence would be indicated. This difference, 4 months, meant that the constitutional analysis was not merely hypothetical. This motivated the court to consider a possible breach of the accused's s.12 right.

[71] The court then set out an analytical framework for the s.12 decision. It made a "particularized inquiry" of the accused, including *Gladue* factors. It considered

the particular circumstances of the offence and the effect of punishment on the offender. It concluded, at par.161 and 162, that a 13 month sentence (in the context of a one-year MMP) is *not* grossly disproportionate to the nine-month sentence which it would otherwise have imposed. Such would not be characterized as abhorrent or intolerable by current standards of decency. The court then engaged in a "hypothetical inquiry", and arrived at the same result.

[72] *R. v, E.R.D.R. [2016] B.C.J. No.774 (BCSC) – 9 to 18 months.* Here a 29 year old first time offender was sentenced for sexual assault of a six year old. The MMP was one year, as it is for S.J.P.. The accused was a family member babysitting the victim at her grandmother's home. The victim fell asleep on the living room couch while watching a movie. The accused took advantage of the sleeping child by undressing her, spreading her legs and touching her vagina. There was no penetration. There may have been licking. He wet his hands in the bathroom and put his head under a towel in preparation for the activity. When she awoke he desisted. The victim dressed. He told her not to tell anyone. She reported the incident some months later. It was said, at. par.11,, that "the sexual assault has had and continues to have negative consequences for her and for her . . . maternal grandmother, as evidenced in the victim impact statements."

[73] This accused had autism spectrum disorder at the lower end, which included a diminished ability to feel empathy. He was found to be in a position of trust an authority towards the victim. He pled guilty. The touching was described as deliberate and purposeful, and the court noted the preparatory steps taken by the accused.

[74] Defence submitted that a suspended sentence and probation would be fit, or at worst a 90 day intermittent sentence of imprisonment. Crown sought 18 to 30 months in jail. The court determined that a sentence in the range of 9 to 18 months would be appropriate. The actual sentence imposed was not reported as of this date, the decision being on the validity of the one-year MMP.

[75] *R. v. H.K. [2014] M.J. No.27 (MBQB) - one year.* This sentence was imposed on a 38 year old accused for two incidents of sexual interference on his 14 year old niece. These occurred during a period when he had the victim under his care, the father being indisposed. On the first occasion, the accused entered the bathroom where the victim was naked, squeezed her breasts and brushed his hand across her pubic area. One week later he coaxed her to unclothe and commented upon her breasts. He pled guilty. He had no criminal record.

[76] At par.16 of this decision a number of cases are summarized, showing the range of sentence in courts in western Canada for roughly similar behaviors.

[77] *R. v. Barua 2014 ONCA 34 - 10 months.* This sentence was upheld on appeal. The accused took advantage of the 8 year old victim by approaching him in his sleep, pulling down his pants, kissing him, licking his penis, and "humping" him. The accused's wife was babysitting at the time. The offence occurred in their home. The conduct ceased when the victim protested and woke up the accused's wife.

[78] The decision primarily concerns the appeal against conviction. Little is given of the sentencing factors, except to note that the conviction had a significant impact on the accused's health and living arrangements.

[79] Here, as elsewhere, there were charges of sexual assault and sexual interference; a stay was entered on the former and sentence applied to the s.151 offence.

[80] *R. v. T.M.B. [2013] O.J. No.3413 – 8 months, reduced to 90 days.* The accused, while looking after his 5 year old granddaughter, removed her pajamas and underwear and lay down with her on the carpet. He touched his penis to her vagina over a two-minute period. There was no penetration, no repetition and no

threats. The aboriginal accused was 59 years old at the date of sentence, a first-time offender, in a stable relationship. He was 53 at the time of the offence. An extensive *Gladue* report was filed showing that he'd had a very difficult upbringing which involved poverty and physical and sexual abuse, and racism. He had good potential for rehabilitation. The offences involved a breach of trust. The MMP at the time was 14 days. At par. 41 of the decision the summary conviction appeal judge says that the 8 month jail sentence imposed was "situated in the range of appropriate sentences" although this was reduced to 90 days given the passage of time and the good behavior of the accused in the intervening period.

[81] *R. v. C.K. [2016] O.J. No. 385 (Ont.C.A.) – 6 months.* Although this case is primarily an appeal of a conviction, a 6 month jail sentence for sexual interference was endorsed in the dissenting judgement (see par. 50). The accused came into a room where she was watching television, pinned her down, removed her pants and underwear and kissed her vagina. She told him to stop. He then pulled up her shirt and bra and kissed her breasts and lips. He left to go to the bathroom, and then returned and warned her not to tell anyone what had happened.

[82] *R. v. Langevin [2016] O.J. No. 2787 (Ont. C.A.) – 1 year.* This 44 year old accused repeatedly hugged and kissed an 11 year old girl, while both were fully clothed, in the cab of the accused's truck. The accused appealed his conviction

and sentence. Both were dismissed. There is little on this judgement about the offender, his record, etc. The lower court decision is unreported. Its value as precedent is thus limited.

[83] *R. v. L.(M.) 2014 QCCQ 4412 – one year.* This accused was found guilty of sexual interference against his 13 year old daughter. The conduct consisted of touching and digital penetration, on two occasions. The victim was severely impacted. The accused had no prior record and stable employment.

[84] *R. v. M.D.S. [2014] B.C.J. No. 788 (BCPC) – 9 months (one year total).* The 53 year old accused lived in the same house as the 9 and 12 year old victims, being in a relationship with their aunt. He touched the genital area of one victim on at least two occasions, and the other victim once, resulting in two counts of s.151. He was a member of a First Nations community, and par. 6 of the decision outlines some of the circumstances of his upbringing.

[85] He was convicted at trial and continued to deny the offences, as with S.J.P.. At par.14 it appears the judge was concerned that this was detrimental to the "healing process of the victim." The victims were obliged to testify, which the trial judge noted was very traumatic for them. A number of mitigating factors were considered (see par. 14). The accused had a limited criminal record for

property damage, impaired driving and possession of stolen goods. He was sentenced to six months on each count, to be served consecutively, for a total of 12 months incarceration. The judge would have sentenced him to 9 months for just one of these in isolation.

[86] *R. v. R.R.G.S. [2014] B.C.J. No.1993 (BCPC) – 90 days.* The accused was convicted, after a four day trial, of sexual touching and unlawful entry into a dwelling. He had a trust-like relationship with the 13 year old victim and used his familiarity with the home and her room to gain access to the residence. The offence took place in the victim's bedroom as she was sleeping and involved kissing her neck and moving her legs apart. When she awoke he immediately stopped and left.

[87] The accused was 27, aboriginal, with a difficult background. His parents were alcoholics, his mother attended a residential school. He had a prior record, though not a related one.

[88] Defence argued that the MMP of 90 days was unconstitutional but the judge found that this MMP did not offend s.12. S/he determined that 90 days in jail was the fit and appropriate sentence, and imposed this term, together with 3 years probation.

[89] *R. v. E.M.W. [2011] N.S.J. No. 513 – 2 years.* This case involved repeated incidents of sexual assault on by the accused on his daughter when she was between 9 and 11 - digital penetration of the vagina while the accused lay in bed with her. A sentence of two years was upheld on appeal by NSCA. While this sentence is well outside the range of sentences which I have been asked to impose by Crown and Defence, the judgement is instructive none the less.

[90] The sentencing judge referred to the review of case law undertaken by Judge Tufts in R. v. S.C.C. 2004 NSPC 41 where the range was found to be conditional sentences at the low end to federal prison terms of 6 years at the high end. He noted that where the touching was over clothing, or a single incident, or happened in an unplanned way such as in the context of horseplay the sentence was more likely to be at the lower end of the range – see par.28. At par.30 the Court of Appeal gives its own summary of cases, exemplifying the varying circumstances and accompanying range of sentence. Although some of these are rather dated they must still be considered relevant, having been referenced in this way. For the purposes of the case before me, I have taken particular note of the decisions summarized at par. 30 (k) to (o) in this judgement.

[91] In *E.M.W.* the sentencing judge noted that the touching was not over the clothes, nor incidental to horseplay, nor isolated. At par.33 one finds the

sentencing judge saying that it was not a momentary lapse of self-control. The fact the abuser was the child's father exacerbated the situation.

[92] In her victim impact statement the girl professed love for her father. She said she was angry and confused. The judge said that these events had changed her life (see par.11)

[93] At par 37 the Court said that two years incarceration was available in appropriate circumstances for mid-range sexual offences without intercourse. The appeal of the two year sentence was thus dismissed.

[94] *R. v. Sawlor, unreported, Sydney, N.S., June 11, 2013 – 4 months.* This accused pled guilty before me to sexual interference on his 3 year old granddaughter. On multiple occasions over a three month period, while babysitting, he touched and rubbed the child's vaginal area with his hand. The Crown proceeded summarily. The accused had an excellent pre-sentence report and an extensive history of employment and community involvement. He had a serious, though well-hidden problem with alcohol abuse. The family was riven by his conduct. I sentenced him to 4 months incarceration.

[95] *R. v. T.E.H. [2011] N.S.J. No. 667 (NSCA) – 16 months (total).* The headnote of this case reads as follows: The offender, age 51, was a family friend

of the victim, age 15. On two occasions, the offender took the victim and the victim's sister to a secluded public swimming hole and hot springs. In respect of the first visit, the victim testified that the offender touched his buttocks while he tried to climb a rock, squeezed his penis while swimming, and tried to convince him to show him his penis. The offender testified that he reached out to steady the victim after he lost his balance while climbing. He denied touching the victim for a sexual purpose. In respect of the second visit, the victim testified that he and the offender engaged in reciprocal oral sex at the offender's request. The victim also testified that the offender rubbed his penis with a towel. The trial judge rejected the offender's evidence denying sexual contact with the victim, specifically rejecting his innocent explanations of the towel and climbing incidents. The trial judge concluded that the offender engaged in sexual activity with the victim and entered convictions.

[96] The offender received consecutive sentences totalling16 months' imprisonment, which sentence was upheld on appeal. A conditional judicial stay was entered in respect of a guilty verdict for sexual assault.

[97] *R. v. W.R.M. [2013] N.S.J. No. 641 (NSSC) – 5 months.* This accused pled guilty to sexual interference for having intercourse with the 14 year old victim while living at her family home. He continued the relationship even after being

charged. He was 22, with a lengthy prior record, including a sexual assault as a young person.

[98] *R. v. J.O. [2014] N.S.J. No. 722 – 14 months.* The following extract, at par.9 of the decision, describes the conduct: Between June 1, 2009 and August 28, 2010 Mr. O. committed four sexual assaults on Ms. D. At that time he was in his early 60's and she was 14 or 15. The assaults were all similar and involved Mr. O. removing Ms. D.'s clothing and sucking or kissing her breasts and vagina. He would rub his penis on the outside of Ms. D.'s vagina. Mr. O. would masturbate and ejaculate on Ms. D.'s stomach or buttocks. On some occasions they would watch pornographic movies.

[99] The accused was tried by jury on charges of sexual assault and sexual interference. The trial judge, at sentence, inferred that the guilty verdicts related to "the much more serious conduct . . . of sexual assault". Applying *Keinapple*, the judge stayed the sexual interference conviction and sentenced Mr. O. under s.271 only.

[100] The judge noted that the victim was intellectually younger than her chronological age. She trusted the accused as a friend and had often confided in him. There was thus was an abuse of a position of trust. The offences occurred

over a one-year period. The accused had no prior record, was 65 years old, and was an alcoholic.

[101] *R. v. J.P. [2013] N.S.J. No. 130 (NSSC) – one year.* The headnote for this case reads as follows: Sentencing of accused convicted of sexual interference, invitation to sexual touching and sexual assault. The accused was married to the sister of the victim's mother. Over a six year period, when the victim was between the ages of six and 12, the accused engaged in sexually inappropriate conduct with her. The conduct began with kissing and progressed to drives where he would invite the victim to sit on his lap and place his hand up her shirt and down her pants under her clothing. In one incident, the accused invited the victim to touch his exposed penis. In her victim impact statement, the victim alleged that the offences denied her a childhood. She did not finish high school, was unable to trust people, especially men, and now that she was a parent it was affecting her relationship with her son. A pre-sentence report indicated that the accused was 63 years of age and had no prior record. He had been married three times. He had three children from his first marriage and had three step-children from his current marriage. He had volunteered in minor hockey and had been involved in soccer. He had been steadily employed throughout his lifetime. He had substantial

financial commitments. The accused continued to deny involvement in the offences.

[102] *R. v. J.A.H. [2011] N.S.J. No. 710 (NSSC) – 6 months.* The accused was charged and convicted under s.271 and s.151; a stay was entered on the sexual assault and the accused sentenced on the sexual interference charge. He accosted his 9 year old daughter in their apartment, late at night, after several hours of drinking. He ordered her to stand in front of him, put his hand down the front of her pajamas, touched her stomach, thighs and vagina. She told him to stop and returned to her bedroom. The accused did nothing further. The MMP in effect was 45 days. The accused had primary care of this daughter, and she held him in affection. The conduct was described as “a single incident that was minimally intrusive”. There is no mention of any prior record. Various ancillary orders were made.

[103] *R. v. Eisan [2015] N.S.J. No. 260 (NSCA) – 14 months.* The accused was convicted of sexual interference. On two occasions in 2009, once during the summer at the family cottage and once at a New Year's Eve party, the accused tried to get the complainant to have sex with him. On the first occasion, he placed her hand on his bare erect penis and rubbed it until he ejaculated. On the second occasion, he grabbed her breasts and ground up against her. The accused pleaded

guilty and was convicted of sexual interference. He was sentenced to 14 months' imprisonment and two years' probation. He had previously been convicted possession of child pornography, careless storage of a firearm, sexual assault and breach of a recognizance. However, he only had one conviction, as a youth, that arose before these charges. The sentence was upheld on appeal.

[104] *R. v. Fraser 2010 NSSC 194 – 9 months.* Here a high school teacher was convicted of sexual exploitation under s.153. He had various forms of intercourse with a 15 year old over a period of one year. The victim described losing friends, having to change schools, and resulting depression. The accused was married and a father of two, with no prior record. He was the sole breadwinner for the family and had a great deal of support.

[105] *R. v. G.K.N. [2014] N.S.J. No. 218 – 18 months.* The accused sexually interfered with his granddaughter between the ages of 7 and 13. He masturbated in her presence and touched her with his lips, hands and penis. The victim went briefly into foster care and began to abuse alcohol and drugs. The accused, who was 60, lost his job. He had a prior, dated record.

[106] *R. v. J.B.O. [2013] N.S.J. No. 431 (NSCA) – 90 days and a 6 month conditional sentence.* In this case a 70 year was charged with touching his 5 year

old granddaughter for a sexual purpose and with exposing himself to his 9 year old granddaughter. In the case of the 5 year old, the conduct occurred when she stayed over at his house. On multiple occasions he slept in bed with her and "played with her vagina" with his hands and penis. In the bath he touched her vagina and used her hand to touch his penis. In the case of the 9 year old, he exposed his penis to her on four occasions. It would seem to be a clear instance of breach of trust. He was sentenced to 90 days for the touching of the 5 year old, a consecutive conditional sentence on the exposure, and probation for three years. The conditional sentence was adjusted to 6 months, but otherwise this sentence was upheld on appeal.

Comment

[107] In Nur, [2015] S.C.J. No. 15 the court said at par.43: "imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime."

[108] Crimes against children do harm to the broader community. They are repugnant and unsettling. They offend deeply held values. It may be noted,

however, that the specific harm done to the particular victim(s) is highly relevant, and aggravating. In E.M.W., above, at par.11, the judge comments on how difficult it will be for the victim, at the threshold of sexual maturity, knowing full well that her father had been fondling her over a two year period, to deal with the matter. This knowledge of what happened, the memory of the event, was an on-going trauma; it would not be "over" for the victim when the accused was sentenced.

[109] The case before me is rare in the sense that the victim, barely 2 years old, has not suffered any actual harm, physical, emotional or psychological. She would have no sense of being violated or hurt. She has lost contact with her father since the event, but in no other sense have her relationships or her supports been affected. It is not possible to predict how long the estrangement from her father will go on. In years to come, someone may choose to inform her of the particular reasons for this. Given the pervasive and persistent nature of the media she may be able to ascertain it from her own inquiries. None the less, M. should not suffer long-term harm in the same way or to the same extent as the victim in E.M.W.

[110] What S.J.P. did to M. was "over" for M. as soon as he stopped. The fact that M. is incapable of filing a victim impact statement is a silver lining on a very dark

cloud. The accused does not deserve a pat on the back for this, but it should be considered in fashioning his punishment.

[111] In addition, as I have noted above, this was a single incident, committed when the accused was not thinking as clearly as he normally would. I acknowledge that the reason for this clouded thinking was partly self-induced.

[112] I think that the proper way to take the "first step" in the *Lloyd* analysis may be found in the following hypothetical. One supposes that S.J.P. committed the offence just before the MMP took effect. He is convicted at trial. At the time of sentence the MMP is the law – Parliament has spoken. This would put me in the same position as the Alberta Court of Appeal in *King*, above – not bound to apply the MMP as such, but not oblivious to it either.

[113] In my view, an appropriate range of sentence for S.J.P., using the foregoing cases for comparison, taking account of the peculiar circumstances of the offence, and recognizing the strong mitigating factors outlined in the background reports, is 3 to 5 months incarceration. Given that Parliament has put in place a MMP of one year, and thus has effectively elevated the seriousness of such conduct, I will settle on the high end of this range, or 5 months, as a fit and appropriate jail sentence for this accused.

[114] As noted above, there will be other components to his sentence which will address the protection of the public. The jail sentence is not his only punishment.

Comparison of the Fit an Appropriate Sentence with the MMP

[115] The Supreme Court, addressing s.11(b) of the Charter, has suggested concrete guidelines for what constitutes unreasonable delay. The Supreme Court has not, to my knowledge, applied any arithmetic values to "gross disproportionality". While *Lloyd* mandates an approach which will give rise to a range of values, *Lloyd* stops short of saying that a fit and appropriate sentence which is less than some particular fraction of an MMP presumptively violates s.12.

[116] Sentencing cannot be reduced to simple arithmetic. I think it is reasonable, none the less, to assess the ratio between (a) the MMP mandated by the Criminal Code and (b) the sentence which I have found to be fit based on standard sentence principles. I think it is appropriate to consider how this ratio, this proportion, compares to other cases where s.12 has been interpreted. I also think it is appropriate to engage in this comparison even though the offences may be of very different character. Jail is jail, regardless.

[117] In E.M.Q., noted above, a sentence which was made four months longer by the MMP was found not to violate s.12. The resulting 13 month sentence, placed

over the “otherwise fit sentence” of 9 months, would give a ratio of 13:9, which is slightly more than 4:3.

[118] In R. v. MacDonald [2014] N.S.J. No. 581 (NSCA) the three-year MMP was deemed to offend s.12 based on a reasonable hypothetical for the offence of possession of a loaded restricted weapon. At the same time the court said that in the actual circumstances of the case, the MMP would *not* offend s.12. Following this line of thought, the court said that two years would be a reasonable “starting point” for such a crime (see par.55). The actual sentence imposed, 18 months, was ultimately approved. The relevance of *MacDonald* to the case before me is found in the relative proportion of the MMP to the fit sentence range. In *MacDonald* that ratio was 3: 2, measured in years.

[119] In the case before me, this ratio is 12 months to 5 months, or slightly greater than 2:1. This higher ratio creates, *ipso facto*, a greater disproportion between the fit sentence and the MMP than was found in *MacDonald*.

[120] The analysis could (and perhaps should) be extended to other cases. For present purposes, in the all the circumstances of the case before me, I am satisfied that a MMP which is more than twice an otherwise “fit and appropriate” sentence for S.J.P. is grossly disproportionate.

Result

[121] I find that S.J.P.'s s.12 right is infringed by the one-year mandatory minimum sentence prescribed by Parliament for his offence.

[122] The Crown does not seek to justify this infringement under s.1.

[123] The s.24(1) remedy is expressed in the 5 month jail sentence which I will ultimately impose, absent the 7 months which I will not.

Dated at Sydney, N.S. this 21 day of July, 2016.

A. Peter Ross, P.C.J.