PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Deyoung*, 2016 NSPC 67

Date: 2016-10-13
Docket: 2820463
Registry: Pictou

Between:

Her Majesty the Queen

v.

Nickolis William Deyoung

Decision Regarding Constitutional Validity of Para. 271(a) of the Criminal Code, and Sentencing Decision

Pursuant to s. 486.4 of the *Criminal Code*, any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W. Atwood
Heard:	13 October 2016 in Pictou, Nova Scotia
Charge:	Para. 271(a) of the Criminal Code
Counsel:	T. William Gorman, for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Nickolis William Deyoung

By the Court:

[1] This is a sentencing decision. There is an order in effect in this case which directs that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

[2] Nickolis William Deyoung was twenty-one years of age when he befriended a fourteen-year-old female on a social-networking site. After spending a brief period of time exchanging messages with this young person over the internet, Mr. Deyoung arranged on 5 January 2015 to have her picked up by a taxi and brought to his apartment; he then engaged in sexual activity with her. The victim described the encounter in these terms: "We watched a movie, and he asked if I wanted to cuddle in his room . . . he began to kiss me, feel me up and then he fingered me . . . my pants were off, then he asked me to have sex . . . I said 'sure, why not' . . . I wasn't thinking." Mr. Deyoung had vaginal sexual intercourse with the victim. The victim then performed fellatio upon Mr. Deyoung; Mr. Deyoung ejaculated into her mouth. At some point, the victim told Mr. Deyoung that she was only fourteen years old. There is no evidence that Mr. Deyoung made any effort to ascertain the victim's age.

[3] The parents of the victim became worried when their daughter did not return home after school; they accessed her social-networking account, and discovered the series of texts she exchanged with Mr. Deyoung setting up their meeting. Mr. Deyoung's telephone number appeared as one of the victim's social-networking contacts; the victim's parents called that number as they tried urgently to ascertain whether their daughter was safe. Mr. Deyoung observed the source of the call on his telephone display, and sent the victim home in a taxi quite hurriedly. Shortly after returning to her parents, the victim disclosed to them what had happened at Mr. Deyoung's apartment. The parents called police and took their daughter to hospital where she was subjected to a SANE procedure.

[4] Mr. Deyoung was worried about what was going to happen; when police arrived at his apartment the next morning, he was in a state of collapse. He acknowledged "doing stuff with an underage girl, sexual things." He admitted knowing that what he had done was wrong, but it hadn't occurred to him that the police would become involved so quickly.

[5] Mr. Deyoung was charged with sexual assault under s. 271 of the *Criminal Code*, case number 2820463, and touching for a sexual purpose under s. 151 of the *Code*, case number 2820464. The prosecution proceeded by indictment.

Mr. Deyoung elected to have his charges tried in this court; he pleaded guilty to sexual assault, and the prosecution withdrew the sexual-touching charge.

[6] Prior to dealing with sentencing, defence counsel filed timely notice with the court of the intent to advance an application to have the mandatory-minimum penalty prescribed in para. 271(a) of the *Criminal Code* adjudged unconstitutional, in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*, and unjustifiable under s. 1 of the *Charter*. Defence counsel served notice on both the Nova Scotia Public Prosecution Service and the Attorney General of Canada within the time limitations laid out in the Nova Scotia Provincial Court Rules.[1]

[7] *Charter* litigation is governed by well established rules regarding burden of proof and standard of proof: first, the burden of proving all elements of the breach of a *Charter* right rests on the person asserting the breach;[2] second, should an applicant discharge that burden, the subsequent inquiry into

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[1] While Rule 2.5(2)(a)(i) of the Provincial Court Rules comprehends trial applications challenging the validity of legislation, and Rule 3 covers the necessity of filing notice in support of those applications, the Rules do not stipulate who ought to be served; *semble*, an opposing prosecution service. But what about, as here, in a provincially prosecuted case when the validity of federal legislation is being challenged? The Provincial Court Rules are silent on this point. The Constitutional Questions Act, R.S.N.S. 1989, c. 89, s. 8, comprehends notice to the Attorney General of Canada, but pertaining only to cases dealing with the constitutional validity of legislation passed by the Nova Scotia Legislature. *Compare: Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings*, SI/2004-134, Rule 14.04(3)(b), which deal precisely with the need to serve the Attorney General of Canada in cases such as this one.

[2] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at para. 38.4.

justification of the infringement under s. 1 of the *Charter* would shift the burden of persuasion to the state.[3]

[8] In my view, Mr. Deyoung has discharged the burden of proving that the mandatory-minimum penalty prescribed in para. 271(a) of the *Code* for sexual assault committed against a person under 16 years of age offends the constitutional protection set out in s. 12 of the *Charter* against cruel and unusual punishment. The prosecution has not discharged the burden of establishing that this violation would constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. Accordingly, I find, for the purpose of this sentencing hearing, the mandatory-minimum one-year penalty set out in para. 271(a) of the *Code* to be of no force or effect; however, this is not a prerogative declaration of statute invalidity pursuant to sub-s. 52(1) of the *Constitution Act, 1982*,[4] but a limited finding of statute invalidity only, made by a statutory court, as comprehended in *R. v. Lloyd*.[5] It is binding upon only the parties to this proceeding, binds no other courts, and is subject to multiple levels of judicial review.

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[3] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 126.
[4] Being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.
[5] 2016 SCC 13 at paras. 14-20.

[9] I intend to keep my reasons on the constitutional-grounds issue as succinct as possible. There are five reasons for this.

[10] First, the evidence called in support of the application for a finding of statute invalidity was not of high calibre, at least with respect to the primary question of whether the challenged penalty would work a cruel and unusual punishment in the particular case of Mr. Deyoung. Since the constitutional case was argued, I have had the benefit of reviewing in detail a sex-offender risk assessment prepared for Mr. Deyoung, and I have considered its contents in making my decision. I shall follow the authoritative direction of the Supreme Court of Canada in *R. v. Lloyd* [6] and approach this decision with economy.

[11] Second, the Department of Justice Canada declined to participate in this preceding. I adjourned the hearing of the *Charter* argument to allow the attendance of counsel for the Minister of Justice and Attorney General of Canada; counsel informed the court that the minister does not intervene in each and every statute-validity proceeding, but might choose to do so on appeal. I comprehend fully the need for the Department of Justice Canada to allocate resources efficiently; the selection of an appellate forum as the best venue to

[6] 2016 SCC 13.

deal with a constitutional question has merit, particularly if it might be possible to aggregate a number of cases dealing with the same issue. Having said that, not hearing from the federal minister in statute-validity cases deprives courts of original jurisdiction of the fullest possible argument in relation to what one would expect to be a foundational policy of the federal government: namely, seeking to uphold the validity of a federal statute. In this case, the challenged penalty was enacted in 2012 as part of the *Safe Streets and Communities Act*.[7] It is within the certain knowledge of the court that the *Act* was a major crime-control initiative of the previous ministry, and was rolled out to the accompaniment of a great deal of publicity.

[12] Some things have changed since then, to be sure.

[13] I have reviewed the mandate letter issued last 13 November 2015 by the Prime Minister to the Minister of Justice. It assigns to the Minister the duty to:

> . . . conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade with a mandate to assess the changes, ensure that we are increasing the safety of our communities, getting value for money, addressing gaps and ensuring that current provisions are aligned with the objectives of the criminal justice system.[8]

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[7] S.C. 2012, c. 1, s. 25, in force 9 August 2012 in virtue of SI/2012-48.

[8] Online at < http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter#sthash.Oh6PRKcQ.dpuf> . It creates an interesting analysis to situate this mandate alongside recent litigation in the Federal Court over the alleged insufficiency of *Charter*-based scrutiny given to government bills before their

[14] There is nothing set out specifically in the mandate letter that would direct that the Minister of Justice not oppose constitutional-grounds litigation that would seek to strike down mandatory-minimum penalties implemented in legislative sentencing reforms over the past decade; however, the wording of the letter suggests quite clearly that those reforms are to get a good going over.

[15] As it is, I am rendering my judgment without submissions from the senior law officer of the Crown whose job it is to uphold the federal law, implicit in which would seem to include the job of arguing in support of its constitutional validity—unless, of course, the Minister should have concluded the legislation is no longer supportable constitutionally. The fact is that mandatory-minimum sentences elevate the level of jeopardy faced by persons who appear before courts charged with crimes; if those mandatory minimums are circling the drain, from an executive-branch-law-reform perspective, it would be good to know it.

[16] The third reason I have for rendering an economical judgment is that, as will be seen later on, this case turns on an assessment of a hypothetical case. Traditionally, hypothetical or moot cases were not considered justiciable. One

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introduction by the executive branch before Parliament for first reading: *see Schmidt v. Canada (Attorney General)*, 2016 FC 269.

eminent jurist suggested that a hypothetical case would be entitled to a hypothetical judgment only.[9] There are risks in basing a real trial and a real judgment affecting real parties on facts which arise from the imagination, even if reasonably foreseeable. And so I feel it best not to overthink a hypothetical case.

[17] The fourth reason I have for limiting my assessment of the constitutional validity of the mandatory minimum sentence in this case—which flows from the last one—is that, since the time the constitutional issue was argued in this case by counsel, the Supreme Court of Canada has issued its judgment in *R. v. Lloyd*.[10] In rendering the decision for the majority, McLachlin CJC stated in her opinion the following:

> 18 To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider

[9] Steven D. Smith, *Law's Quandary* (Cambridge: Harvard University Press, 2004) at 125-134.

[10] *Supra*, note 6. The application of judicial economy in provincial courts in cases involving the constitutional review of minimum punishments operates as an intriguing post-script to *R. v. Ferguson*, 2008 SCC 6 (S.C.C.) which made away with the constitutional exemption as a remedy for a s. 12 *Charter* violation. Given the limited, non-binding authority of provincial courts to deal with such cases, and given the direction in *Lloyd* that provincial courts pursue economical analyses, it would seem that judgments out of provincial courts which find s. 12 violations to have been proven are really not much more than constitutional exemptions. A return to that sort of remedy would address some of the concerns raised by Professor Lisa Dufraimont in "R. v. Ferguson and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12", (2008) 42 Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference at 459.

> its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as a condition precedent to considering the law's constitutional validity, would place artificial constraints on the trial and decision-making process.

[18] In this case, much of the constitutional argument had to do with the court's consideration of reasonable hypotheticals, as was unconditionally allowed in the line of authority that preceded *Lloyd*. Given that I had already begun composing my judgment addressing that issue, I might as well see it through, but with economy. This follows as well the long-standing principle that courts should avoid commenting on the "wisdom or expediency or policy of an Act lawfully passed".[11]

[19] My final reason for trying to be brief is that this issue was decided by my colleague Ross J.P.C. just a couple of months ago, in *R. v. S.J.P.*[12] My reasons will not equal his.

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[11] *References by the Governor in Council (Re)*, [1912] J.C.J. No. 2 at para. 5 (J.C.P.C.).
[12] 2016 NSPC 50. *See also R. v. E.R.D.R.*, 2016 BCSC 684 and 2016 BCSC 1759.

Historical context

[20] Mandatory-minimum sentencing is laden with a dark ancestry. Legal historians will recall the mandatory-ultimate penalties laid down in the *Black Act*,[13] under which the filching of one farthing too many meant the difference between the gaol and the gibbet.

[21] Hard outcomes in marginal cases, and advances in the social sciences of penology and criminology, led legislatures away gradually from mandatory sentences, resulting in courts being afforded considerable discretion in the imposition of appropriate penalties upon offenders.

[22] Prior to the Fortieth Parliament, few mandatory-minimum penalties had made their way into the *Criminal Code*,[14] most efforts to get them enacted had been led unsuccessfully and imperfectly by private members,[15] and almost all of the small number of those that wound up enjoying executive sponsorship dealt with firearms.[16] Parliament's earlier forbearance against mandatory minimums

[13] *Criminal Law Act*, 9 Geo. I, c. 22.
[14] See Nichole Crutcher, "The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada" (2001) Osgoode Hall L.J. 273.
[15] *Id*., at 280..
[16] *E.g*., S.C. 1995, c. 39, s. 139.

could have had something to do with the strong recommendation against them made by the Archambault Commission back in 1987.[17] It might also have had to do with the accumulation of credible social-science data—much originating in the United States—that seemed to suggest that mandatory minimums did not deter crime very much, did not serve to rehabilitate offenders, did not keep communities safer, and cost a lot to administer: that evidence continues to build up.[18]

[23] I do not assign any weight to these extrinsic data, as it is clear that I may not rely on independent research to inform my judgment as to pertinent facts.[19] I recite them merely to provide an historical context for my decision. But with this proviso: I do not believe that there would be any error in my relying on research which consists merely in the recital of a legislative record or legislative history.

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[17] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 173-190.

[18] As a result of which many erstwhile tough-on-crime jurisdictions started to repeal mandatory minimums: *see* Department of Justice Canada, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models* by Julian V. Roberts (Ottawa: Research and Statistics Division, 2005) at 3-7; *and see* Raji Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing* (Vancouver: B.C. Civil Liberties Association, 2014) at 10. *See* Ram Subramanian & Alison Shames, "Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States" (2014) 27 Fed. Sen. R. 33 for a summary of relevant U.S. statistics on the ineffectiveness of mandatory minimums.

[19] *R. v. C.N.T. [B.M.S.],* 2016 NSCA 35 at para. 17.

[24] Allow me to resume my analysis. Starting with the Fortieth Parliament, the pendulum began to slip back the other way. Whereas in 1982, there were only six mandatory-minimum sentences prescribed in the *Code*, by 2006, that number had jumped to forty. At present, there are nearly eighty in the *Code*, and another twenty-six in the *Controlled Drugs and Substances Act*.

[25] As this legislative agenda began its charge ahead, Arbour J. made the following observations in her opinion which constituted the judgment of the unanimous panel of the Supreme Court of Canada in *R. v. Wust*:

> 18 Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the *Code*, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the *Code*: the principle of proportionality. Several mandatory minimum sentences have been challenged under s. 12 of the Charter, as constituting cruel and unusual punishment: see, for example, *R. v. Smith*, [1987] 1 S.C.R. 1045, *R. v. Goltz*, [1991] 3 S.C.R. 485, and *Morrisey, supra*.
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> 19 On some occasions, a mandatory minimum sentence has been struck down under s. 12, on the basis that the minimum prescribed by law was, or could be, on a reasonable hypothetical basis, grossly disproportionate to what the circumstances called for. See, for example, Smith, striking down s. 5(2) of the *Narcotic Control Act*; *R. v. Bill* (1998), 13 C.R. (5th) 125 (B.C.S.C.), striking down the four-year minimum sentence for manslaughter with a firearm under s. 236(a) of the Code; *R. v. Leimanis*, [1992] B.C.J. No. 2280 (QL) (Prov. Ct.), in which the s. 88(1)(c) minimum sentence of the B.C. Motor Vehicle Act for driving under a s. 85(a) prohibition was invalidated; and *R. v. Pasacreta*, [1995] B.C.J. No. 2823 (QL) (Prov. Ct.), where the same penalty as in *Leimanis* for driving under a s. 84 prohibition was also struck down.
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> 20 In other cases, courts have fashioned the remedy of a constitutional exemption from a mandatory minimum sentence, thereby upholding the enactment as valid while exempting the accused from its application: see *R. v. Chief* (1989), 51 C.C.C. (3d) 265 (Y.T.C.A.), and *R. v. McGillivary* (1991), 62

> C.C.C. (3d) 407 (Sask. C.A.). Finally, in some of the cases where the courts have upheld a minimum sentence as constitutionally valid, it has been noted that the mandatory minimum sentence was demonstrably unfit or harsh in the case before the court. See, for example, *McDonald, supra*, at p. 85, per Rosenberg J.A., and *R. v. Hainnu*, [1998] N.W.T.J. No. 101 (QL) (S.C.), at para. 71.
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> 21 Even if it can be argued that harsh, unfit sentences may prove to be a powerful deterrent, and therefore still serve a valid purpose, it seems to me that sentences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law. It is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92, per Lamer C.J.; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 93, per Cory and Iacobucci JJ.
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> 22 Consequently, it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. This is entirely possible in this case, and, in my view, such an approach reflects the intention of Parliament that all sentences be administered consistently, except to the limited extent required to give effect to a mandatory minimum.[20]

Mandatory minimum punishment for sexual assault

[26] Section 271 of the Code was amended by the *Safe Streets and Communities Act*. At the time of the commission of Mr. Deyoung's offence, the statute read as follows:

> 271. Everyone who commits a sexual assault is guilty of
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> (a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of one year; or

[20] 2000 SCC 18.

> (b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding 18 months and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of 90 days.[21]

[27] Defence counsel asserts that the one-year mandatory minimum sentence for the offence of sexual assault, prosecuted indictably, offends s. 12 of the *Charter*, which declares as a basic law of Canada that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[28] In evaluating the merits of this argument, it is useful to examine how other mandatory-minimum-penalty provisions have fared in constitutional-grounds challenges.

[29] In fact, the Supreme Court of Canada has struck down a number of mandatory-minimum penalties fixed in the *Code* and other laws after having found that they offended the guarantees in s. 12. These include:

- Mandatory-minimum sentence of one year of imprisonment for trafficking or possession for the purpose of trafficking, in cases when the

[21] *Supra*, note 7; amended by S.C. 2015, c.23, s14 in force 2015 Jul 17 SI/2015-68, which increased the maximum penalty under an indictable process to a term of imprisonment of 14 years in the case of a complainant under the age of 16 years, and increased the maximum summary-conviction term to a term of two years less a day, again, in the case of a complainant under 16 years of age. There is no argument before the court that this amendment is in play in this proceeding.

offender has a record for any drug offence (except possession) within the previous 10 years; [22]

- Mandatory-minimum terms of imprisonment for possession of prohibited or restricted firearms;[23]

- Mandatory-minimum sentence of seven-years for importation of a narcotic under the *Narcotic Control Act*.[24]

[30] The Court has stated also that mandatory minimum-sentences are subject to being reduced below the *minima* to take into account pre-trial detention.[25]

[31] It has also upheld some:

- Mandatory-minimum four-year sentence for manslaughter with a firearm;[26]

- Mandatory-minimum sentence of life imprisonment with no chance of parole for 10 years for second-degree murder;[27]

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[22] *R. v. Lloyd*, 2016 SCC 13.
[23] *R. v. Nur*, 2015 SCC 15.
[24] *R. v. Smith*, [1987] 1 S.C.R. 1045.
[25] *Wust, supra*, note 18; *R. v. Arthurs*, 2000 SCC 19.
[26] *R. v. Ferguson*, 2008 SCC 6.
[27] *R. v. Latimer*, 2001 SCC 1.

- Mandatory-minimum four-year sentence for criminal negligence causing death with a firearm;[28]

- Mandatory-minimum 7-day sentence for driving while prohibited as a charge under a provincial highway-traffic statute.[29]

[32] A number of analytical principles emerge from these cases that direct me in my s. 12 *Charter* analysis.

[33] A penalty provision in a statute would infringe s. 12 if it were found to be grossly disproportionate to the appropriate punishment, having regard to the seriousness of the offence and the circumstances of the offender; accordingly, such a penalty would violate s. 12 if it were to impose a grossly disproportionate sentence on the individual before the court, or if its reasonably foreseeable applications would impose grossly disproportionate sentences on others.[30]

[34] There is a high threshold to be surmounted by defence before a court might find that a sentence would represent a cruel and unusual punishment. To be grossly disproportionate, a mandatory-minimum sentence must be found to be

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[28] *R. v. Morrisey*, 2000 SCC 39.
[29] *R. v. Goltz*, [1991] 3 S.C.R. 485.
[30] *Lloyd, supra*, note 9, at para. 22.

more than merely excessive: It must be "so excessive as to outrage standards of decency" and be "abhorrent or intolerable" to society.[31]

[35] In my view, constitutionally challenging problems arise when offences with broad elements, capturing criminality of vast ranges—yes, the serious, but ranging downward to the relatively minor—are subjected to substantial and unyielding mandatory-minimum sentences.

[36] As described by Arbour J. in her minority concurring opinion in *R. v. Morrissey*, a mandatory-minimum sentence works to impose an inflationary floor which exerts an upward pressure on all sentences for the offence to which the mandatory minimum is applicable. This creates a constitutional problem only when the statutory impossibility of going below the minimum would be offensive to s. 12 of the *Charter*, as would be the case when the mandatory-minimum penalty would require the imposition of a sentence that would not merely be unfit—which is constitutionally permissible—but also grossly disproportionate to what an appropriate punishment should be, which is constitutionally impermissible.[32]

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[31] *Id*., at para. 24.
[32] 2000 SCC 39.

[37] Consequently, the first question I must address is, as I stated previously, whether the imposition of the mandatory-minimum penalty in this case, given the circumstances of Mr. Deyoung and the circumstances of his offence, would be a grossly disproportionate punishment?

[38] The facts before the court posit the sexual assault of a person under the age of sixteen years. Mr. Deyoung had unprotected sexual intercourse—including vaginal intercourse and fellatio—following an arranged encounter with a minor, which is serious and risk laden. A one-year sentence of imprisonment in such a case—even in circumstances such as Mr. Deyoung's—would not, in my view work a grossly disproportionate penalty, given sentences that have been imposed in courts in this province for offences committed in similar circumstances by similar offenders.[33]

[39] But sexual assault can include the least touching that affects the sexual integrity of a victim.[34]

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[33] *See R. v. Oliver*, 2007 NSCA 15, two-year sentence upheld on appeal for an intellectually-challenged offender who had sexual intercourse on two occasions with a minor victim; *R. v. A.P.S.B.* 2016 NSSC 29, one-year term of imprisonment followed by 24-month term of probation for intellectually limited offender who befriended a minor on line and travelled to Nova Scotia for a brief but intense sexual relationship; *and see R. v. Fitzgerald*, 2014 NSPC 1 and *R. v. MacLean*, 2015 NSPC 70, both of which resulted in sentences of two-years' imprisonment. See also *R .v. E.R.D.R.*, note 12, *supra*.

[34] *See, e.g., R. v. A.Z.*, [2000] O.J. No. 4080 at para. 6 (C.A.).

[40] Consider as well that, prior to 1 May 2008, when the age of consent was raised from 14 years to 16 years of age,[35] Mr. Deyoung's actions would not have attracted criminal liability. One academic review of the legislative history of that amendment to the *Code* seemed to suggest that it moved along due more to politics and plotting than to policy and evidence;[36] however disconcerting that conclusion might be, it is not relevant to this case. It is enough to say that the criminality that places Mr. Deyoung's liberty in jeopardy is of fairly recent statutory origin.

[41] Equally of moment is that the mandatory-minimum penalty in this case punishes not only serious sexual abuse of minors, but also criminal conduct that, in terms of proportionality, might be far less serious or engage a far lesser degree of criminal responsibility and moral culpability than offences at the upper extremities of criminality.

[42] Consider the effect of the law relating to age of consent upon criminal liability and penalty. The *Criminal Code* describes a sharp liability gradient for sexual assault and related offences. Sub-section 150.1(1) of the *Code* fixes the age for consenting to sexual activity in Canada at sixteen. However, the

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[35] In virtue of S.C. 2008, c. 6, s. 13, in force 1 May 2008 by SI/2008-34.
[36] Carol L. Dauda, "Sex, Gender, and Generation: Age of Consent and Moral Regulation in Canada" (2010), 38:6 Politics & Policy at 1169-1177.

remaining subsections create a number of close-in-age exemptions from criminal responsibility. It is useful to my analysis to set out the relevant portions of the statute, as in effect at the time of this offence:

> Consent no defence
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> 150.1 (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.
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> Exception - complainant aged 12 or 13
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> (2) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complain- ant who is 12 years of age or more but under the age of 14 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused
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> (a) is less than two years older than the complainant; and
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> (b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.
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> Exception - complainant aged 14 or 15
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> (2.1) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if
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> (a) the accused
>
> (i) is less than five years older than the complainant; and
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> (ii) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant; or
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> (b) the accused is married to the complainant.

[43] Take the case of an adult, one-day shy of the adult's twentieth birthday, having non-exploitive, consensual and minimally forceful sexual contact with a

15-year-old minor on the minor's birthday. Assume no position of trust or dependency. In virtue of sub-s. 150.1(2.1) of the *Code*, the adult would have a complete defence in virtue of being less than five years older than the complainant. But change the scenario by a day or two—a just-twenty adult and a just-fifteen, or fifteen-less-a-day minor? The subsection would no longer offer a defence.

[44] Consider next an adult eighteen years of age having consensual, non–exploitive sexual contact with a minor fourteen years of age less a day. No close-in-age-exemption would be available to the adult in virtue of sub-s. 150.1(2) of the *Code* which allows only a two-year difference in age for minors under fourteen. But if the adult and the minor were to wait until the minor's birthday the next day, the five-year exemption under 150.1(2.1) would apply, and no criminality would arise.

[45] It is hard to imagine in these hypothetical cases that, with the passage of but a few days, so great an incipient level of criminality would be inherent in a person's conduct as to justify constitutionally the mandatory-minimum penalty in para. 271(a) of the *Code*.

[46] These are reasonably foreseeable hypotheticals, and for the notional offenders caught just outside the close-in-age exemptions, or having committed acts at the lower end of the spectrum of seriousness, the imposition of the mandatory minimum would be harsh; indeed, so excessive as to outrage standards of civil decency, and would be abhorrent and intolerable to society.

[47] Is the mandatory one-year minimum saved by s. 1 of the *Charter*? In other words, is the constitutional infringement of the right not to be subjected to any cruel or unusual punishment which is created in virtue of the mandatory-minimum sentence in para. 271(a) of the *Code* cured as being a reasonable limit, prescribed by law, imposed on a constitutional right as can be demonstrably justified in a free and democratic society? In my view, the answer is "no".

[48] Parliament's objective in enacting the mandatory minimum—to denounce and deter the sexual abuse of young persons—is a very important public-policy objective.[37]

[49] The problem with the mandatory-minimum penalty prescribed in para. 271(a) is that it does not impair minimally those rights guaranteed under s. 12

[37] *R. v. Oakes*, [1986] 1 S.C.R. 103, at 141.

of the *Charter*. The mandatory minimum catches a broad swath of conduct of varying degrees of seriousness and moral blameworthiness, and admits of no exceptions—unlike, say, the mandatory minimum sentence in clause 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* for trafficking with a prior record for a designated offence, which, in fact, admitted of an exception under sub-s. 10(5) of the *CDSA*; this provision exempted from the mandatory-minimum two-year penitentiary term prescribed by the statute those offenders who had completed a drug-treatment program. Significantly, even with that exception, the Supreme Court of Canada struck down clause 5(3)(a)(i)(D) in *Lloyd*, *supra*.

[50] The prosecution asserts that there is a pressure-release valve in the statute, as s. 271 of the *Code* describes a dual-procedure offence; the prosecution is able, it is argued, to avoid any unconstitutional effects of the one-year mandatory minimum by electing to proceed summarily in appropriate cases involving lesser degrees of criminality. In advancing this argument, the prosecution invites the court to apply the reasoning of Moldaver J. in *R. v. Nur*:

> 130 I should add that the Crown election under s. 95 differs from the prosecutorial discretion discussed in Smith. In that case, the Court rejected the argument that the Crown's discretion not to apply the law -- that is, to charge a lesser offence or no offence at all -- could salvage the impugned mandatory minimum. Here, the relevant discretion is the Crown election, which has been purposely integrated into the legislative scheme. Far from being a discretion not

> to apply the law, the Crown election is a clear expression of Parliament's intent to confer on prosecutors the ability to divert the least serious cases into summary proceedings. It is a mistake, in my view, to shunt this factor aside when crafting reasonable hypotheticals.
>
> . . . .
>
> 150 Rather, the proper analytical framework should focus on the safety valve -- the Crown's discretion to elect summary proceedings in the least serious cases. I will describe that framework in detail below. Briefly, it has two stages. First, the court must determine whether the hybrid scheme adequately protects against the imposition of grossly disproportionate sentences in general. Second, the court must determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence for a particular offender.
>
> . . . .
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> 157 I would adopt a two-stage framework to evaluate whether a mandatory minimum sentence in a hybrid scheme complies with s. 12. First, the court must determine whether the scheme adequately protects against grossly disproportionate sentences in general. Second, the court must determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence for the particular offender before the court.

[51] There is a problem with the argument advanced by the prosecution: whatever one might think of the merits of the analysis undertaken by Moldaver J., it was a minority and dissenting opinion. The safety-valve argument was considered by the Chief Justice in her opinion in *Nur*—which was concurred in by the majority—and she concluded as follows:

> 94 I add this about my colleague's proposed framework. The protection it offers against grossly disproportionate punishment is illusory: in practice it would create a situation where the exercise of the prosecutor's discretion is effectively immune from meaningful review. The abuse of discretion standard is a notoriously high bar and has no place in this Court's jurisprudence under s. 12 of the *Charter*. The proposed framework would be a radical departure from the constitutional framework in these cases, and offers scant protection from grossly disproportionate sentences being imposed on offenders.

> 95 Two further objections may be raised against the argument that prosecutorial discretion can cure a sentencing provision that violates s. 12 of the Charter. The first is that one cannot be certain that the discretion will always be exercised in a way that would avoid an unconstitutional result. Nor can the constitutionality of a statutory provision rest on an expectation that the Crown will act properly: *Lavallee, Rackel & Heintz v. Canada (Attorney General),* 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 45. As Cory J., for the majority, stated in *R. v. Bain,* [1992] 1 S.C.R. 91, at pp. 103-4:
>
> > Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.

[52] Furthermore, as the Chief Justice pointed out:

> 96 This leads to a related concern that vesting that much power in the hands of prosecutors endangers the fairness of the criminal process. It gives prosecutors a trump card in plea negotiations, which leads to an unfair power imbalance with the accused and creates an almost irresistible incentive for the accused to plead to a lesser sentence in order to avoid the prospect of a lengthy mandatory minimum term of imprisonment. As a result, the "determination of a fit and appropriate sentence, having regard to all of the circumstances of the offence and offender, may be determined in plea discussions outside of the courtroom by a party to the litigation" (R. M. Pomerance, "The New Approach to Sentencing in Canada: Reflections of a Trial Judge" (2013), 17 Can. Crim. L.R. 305, at p. 313). We cannot ignore the increased possibility that wrongful convictions could occur under such conditions.

[53] This very concern was highlighted about a decade earlier in a significant work on the skewing effect of mandatory minimums in the plea-bargaining process.[38]

[38] Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial" (2004) 117:8 Harvard Law Rev. 2463 at 2486-2491.

[54] The opinion of the Chief Justice on this point was not *obiter*; rather, it was integral to the determination of the Court's reasonable-limits analysis. It carries the full force of law, and, unlike a dissenting, minority opinion, is binding on this court according to the principle of *stare decisis*. The position taken by the prosecution confuses significantly the precedential value or binding effect of a dissenting opinion of a judge of a supervisory court in a case in which the majority reached a differing opinion.[39]

[55] I find that the mandatory-minimum penalty in para. 271(a) of the *Code* is not saved by s. 1 of the *Charter*.

[56] Having found the mandatory-minimum sentence in para. 271(a) of the *Code*, for sexual assault of a person under the age of 16 years, an infringement of the right not to be subjected to cruel or unusual punishment under s. 12 of the *Charter*, and having found the provision not saved by s. 1 of the *Charter*, I turn to the imposition of an appropriate sentence upon Mr. Deyoung.

[57] Mr. Deyoung elected trial in this court and pleaded guilty to a single count of sexually assaulting a person under the age of 16 years, contrary to para. 271(a) of the *Criminal Code*. I have found unconstitutional for the purposes of

[39] *R. v. Sellars* [1980] 1 S.C.R. 527 at 528; *and see, e.g., R. v. Gnam*, 2013 ABCA 254 at para. 21.

this hearing the mandatory-minimum penalty of one year in prison; the maximum penalty under the statute is ten years, given the age of the victim. The prosecution submits that the range of penalty described by reported cases is from eighteen months to three-years' imprisonment, and seeks a sentence of two to three years in a federal penitentiary along with ancillary orders. Defence counsel argues in favour or a purely community-based sentence. Given that I have found the mandatory minimum sentence unconstitutional, the court may consider a wide array of legal sentences, including a discharge under s. 730 of the *Code*, a suspended sentence under para. 731(1)(a) of the *Code*, a fine alone under s. 734, and, yes, imprisonment, as well as a combination of these. I may not impose a conditional sentence, given the restrictions in sub-para. 742.1(f)(iii).[40]

[58] Sentencing is a highly individualized process: *R. v. Ipeelee*.[41]

[59] In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances; that is prescribed by para. 718.2(a) of the *Criminal Code*. The court must consider also objective and

[40] Assuming a similar finding of mandatory-minimum penalty unconstitutionality, a charge under s. 151 of the *Code* committed the same date as this offence would have been eligible for a similar array of community-based sentences, as well as a conditional sentence, as s. 151 is not expressly excluded from the conditional-sentencing regime in para. 742.1(f), and carried a maximum of only 10 years prior to the in-force date of S.C. 2015, c.23, s14 so as not to have been caught by 742.1(c).

[41] 2012 SCC 13 at para. 38.

subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case.[42]

[60] In assessing an offender's moral culpability, the court must take into account the fact that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. That fundamental principle is set out in Section 718.1 of the *Criminal Code.*

[61] At para. 37 of *Ipeelee*, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims, and it seeks to ensure public confidence in the justice system.

[62] In the recent decision of *R. v. Lacasse*,[43] the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence. The severity of the sentence depends upon the seriousness of the consequences of crime and the moral blameworthiness of the individual offender. The Court recognized at para. 12 that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences

[42] *R. v. Pham*, 2013 SCC 15 at para. 8.
[43] 2015 SCC 64.

imposed upon an offender might have the effect of undermining public confidence in the administration of penal justice.

[63] In determining an appropriate sentence, the court is required to consider, pursuant to para. 718.2(b) of the *Criminal Code,* that a sentence should be similar to sentences imposed upon similar offenders for similar offences committed in similar circumstances. This is the principle of sentencing parity. The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances; furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances.

[64] In *R. v. S.C.C.*, my colleague Tufts A.C.J.P.C. listed a number of correlative factors I find useful in assessing the level of seriousness of cases involving child sexual abuse; these include:

> (1) the degree of invasiveness or the nature of the assaults and the variety of the acts;
>
> (2) the presence of other form of physical violence beyond the abuse itself;

(3) the presence of threats or other psychological forms of manipulation;

(4) the age of the victim;

(5) other forms of vulnerability of the victim besides the parent/child relationship;

(6) the number of incidents and the period of time over which the abuse occurred;

(7) the impact on the victim;

(8) the risk to re-offend.[44]

[65] In applying these criteria to this case, I note that, while not at the upper ranges of severity—as this was a single occurrence of sexual assault, unaccompanied by violence other than the abuse itself—this was a serious offence: Mr. Deyoung befriended a fourteen-year-old minor randomly on a social-networking site; while there is no evidence that Mr. Deyoung was targeting minors, there is no evidence that he made any effort to ascertain the victim's age. Mr. Deyoung persuaded the victim to visit him at his apartment, and sent a cab to pick her up. It was Mr. Deyoung who coaxed the victim into escalating levels of sexual activity, culminating in full intercourse and

[44] 2004 NSPC 41 at para. 16.

unprotected oral sex. The victim declined to file a victim-impact statement; however, I feel I may infer safely from the circumstances that there was significant impact suffered by her: her parents were very upset at her, she was subjected to a SANE procedure, she had to go through an investigative process with police, and I take from her comment "I wasn't thinking" that she has experienced regret and anxiety.

[66] I shall deal with the risk-of-reoffending point shortly.

[67] Section 718.01 and sub-para. 718.2(a)(ii.1) of the *Code* help situate the level of seriousness of this offence: when the court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, that factor shall be deemed an aggravating circumstance and the court is required in such a case to give primary consideration to the objectives of denunciation and deterrence of such conduct.

[68] These provisions codify principles which have been applied for a long time by sentencing courts dealing with child sexual abuse.

[69] With respect to Mr. Deyoung's moral culpability, I find that there was a significant degree of planning and premeditation in this offence: Mr. Deyoung persuaded the victim to visit him at his apartment, and even arranged to send a

taxi to drive her there. It was Mr. Deyoung who led the victim into escalating levels of sexual activity. Accordingly, I find Mr. Deyoung was the one solely responsible for this crime.

[70] I have to assist my assessment of Mr. Deyoung's risk of reoffending a presentence report and a forensic sexual behaviour presentence assessment. Counsel have agreed that I consider as well the s. 672.2 assessment report which I ordered soon after Mr. Deyoung's arraignment. I shall focus on the forensic sexual behaviour presentence assessment and the s. 672.2 report, as they explore in greater detail what is contained in the fairly succinct PSR.

[71] The s. 672.2 assessment describes Mr. Deyoung as being in the low-average range of intellectual functioning, more likely in the range of a mild intellectual disability; this was the subject of testimony by his mother, who, while not qualified to give psychological evidence in the field of intellectual function and behaviour, described to the court the challenges she witnessed Mr. Deyoung facing in school, as he interacted with peers, and as he coped with social pressures and problem solving. Much of what she told me was confirmed in the s. 672.2 assessment under the heading of "Background Information". From a young age, Mr. Deyoung's language skills have been very limited. He struggles with attention to and comprehension of language; he has difficulty with

memory skills. A psychoeducational assessment done when Mr. Deyoung was 7 years old placed his overall cognitive ability at the 6th percentile borderline range (*i.e.*, he performed more poorly than 94 percent of his peers); an assessment done when he was 11 years old placed him at the 9th percentile.

[72] Low self-esteem led him to gravitate toward a younger peer group; he was a follower, not a leader.

[73] The s. 672.2 assessment found that, while Mr. Deyoung met the criteria for mental disorder under s. 16 of the *Code*, in virtue of his mild intellectual disability, his condition was not so profound as to prevent him from being able to appreciate the nature and quality of his actions, or from knowing that they were wrong.

[74] The forensic sexual behaviour presentence assessment covers in greater detail the biographic and diagnostic information in the s. 672.2 assessment; the author of the report was able to draw a number of conclusions based on that information.

[75] At page 23 of 31 of the assessment, the assessor states:

> [I]t appears that immaturity and poor judgment rather than deviant sexuality were the main factors accounting for his offending. Given his social and intellectual functioning, it is not surprising that Mr. Deyoung might feel comfortable

> socializing with a teenaged girl. Unfortunately, out of that, he acted in a manner consistent with having had other "friends with benefits". Moreover [the victim] verbalized assent when he asked her to engage in sex. With his concrete comprehension and difficulties reading social cues unless they are obvious, he is unlikely to have recognized any non-verbal signs of ambivalence when she gave verbal assent, although in retrospect, he agreed that his behaviour was inappropriate regardless because of [the victim's] age. [Identifying information redacted by the court.]

[76] One finding in the assessment—at page 22 of 31— causes the court considerable concern:

> Mr. Deyoung recalled that during vaginal intercourse with [the victim], "she looked like it hurt". When asked to explain, he stated that she was making "grunting noises". Therefore, he allegedly slowed down, implying that he was not trying to hurt [the victim]; however, it did not occur to him to stop entirely. His decision in this regard suggests that Mr. Deyoung does not wish to deliberately injure a sexual partner (and recall that during PPG assessment he did not respond to stimuli that involved physical violence and threats). However, once sexually aroused and believing himself to have consent, he might not alter pleasure-oriented behaviour despite situational changes that would warrant it. Difficulty in perceiving and interpreting social cues would play a role in this as well.

[77] I consider this along with the PPG assessment results in the report—at pages 17 to 19.

[78] To this I would add that it would seem that Mr. Deyoung might not alter pleasure-oriented behaviour despite the existence of static circumstances—such as the age of the target of his behaviour—which would prohibit it.

[79] At page 24 of 31 of the assessment, under "Measurement of psychopathy", Mr. Deyoung was classified as a low risk for violence associated with psychopathy. Under the heading of "Actuarial risk assessments" at pages 24-25 of 31, he was classified as a low-to-moderate risk for violence compared to the subset of sexual offenders upon which the Sex Offender Risk Assessment Guide was based.

[80] I consider this evidence in conjunction with the actual facts of this case: Mr. Deyoung was the prime mover in this crime, and no fault is to be attributed to the victim in any way. The essential innocence of victims of child sexual abuse was a principle affirmed by the Alberta Court of Appeal in *R. v. Pritchard*, and I agree entirely with that proposition.[45] Mr. Deyoung's cognitive and social deficits did not inhibit him from initiating contact with the victim by means of a social-networking site, and continuing that contact up to the point in time he invited her for a visit; nor did it inhibit him from arranging to have a taxi pick the victim up and bring her to his apartment where he would certainly have the capability to exercise a degree of control over her.

[45] 2005 ABCA 240 at para. 7.

[81] Although Mr. Deyoung's level of planning and calculation might not have reached the high level of grooming and predation as in, say, *R. v. Stewart*,[46] I consider Mr. Deyoung's moral culpability to be in the mid-range on a scale of gravity.

[82] The prosecution has referred the court to a number of authorities in support of its sentencing submissions:

- *R. v. Oliver*.[47] An offender with intellectual deficits was sentenced by the original sentencing judge to a two-year penitentiary term, followed by a one-year term of probation; the offender had had sexual intercourse on three occasions with a 12-year-old minor whom he impregnated; appeal from sentence dismissed.

- *R. v. E.M.W.*[48] Offender found guilty following trial of having fondled and digitally penetrated his daughter when she was between 9 and 11 years of age. Two-year federal term upheld on appeal.

[46] 2013 NSPC 64; varied 2016 NSCA 12.
[47] 2007 NSCA 15.
[48] 2009 NSPC 65; aff'd. 2011 NSCA 87.

- *R. v. Taweel*.[49] Adult offender found guilty following trial of having sexual intercourse with 14-year-old family friend. Sentence of 28-months' imprisonment imposed.

- *R. v. MacLean*.[50] Joint submission of two-years' imprisonment imposed for a single instance of sexual intercourse with a 14-year old female. The fact in support of the charge described the offence as "entirely an act of consensual intercourse".

[83] In reviewing the cases submitted by the prosecution, I caution myself by observing that such factors as joint recommendations, more serious criminal conduct, and significant aggravating factors characterized those decisions: *MacLean*—a joint submission; *Taweel* and *Oliver*—multiple instances of intercourse; *E.M.W.*, parental sexual abuse of a minor.

[84] Defence counsel did not present the court with authorities in support of a purely community based sentence.

[49] 2014 NSSC 310; appeal from conviction allowed, 2015 NSCA 107.
[50] 2015 NSPC 70.

[85] Relevant to the fixing of an appropriate range of sentence are the cases I referred to in deciding the constitutional issue, which would support a range of one-to-two years' imprisonment.[51]

[86] I agree with defence counsel that Mr. Deyoung is very remorseful—he said so in his s. 726 allocution to the court; furthermore, he is likely to respond reasonably well to counselling and rehabilitative programming. Finally, he has no prior record. Lack of a prior record should be treated as having some mitigating effect in assessing moral responsibility, even in cases involving serious abuse of a child.[52]

[87] Nevertheless, the imposition of a purely community-based sentence would require the court to disregard the imperative emphasis on denunciation and deterrence required to be applied by sentencing courts in punishing those guilty of child sexual abuse.

[88] I find that a proportionate sentence in this case is the imposition of a twelve-month term of imprisonment. While the reported authorities which I have considered reveal the imposition of lengthier sentences in somewhat similar cases, Mr. Deyoung's youthfulness, willingness to accept treatment, and bail

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[51] Note 33 *supra*.
[52] *See R. v. J.B.*, [2004] O.J. No. 2559 at para. 30 (C.A.); *R. v. Gordon* (1984), Sask. R. 232 at 233 (C.A.).

compliance (except for one impaired-driving offence) satisfy me that this is a case that warrants the application of the principle, as outlined by the Nova Scotia Court of Appeal in *R. v. Colley*, that if the need to protect society might be well served by a shorter sentence as by a longer one, the shorter ought to be preferred.[53]

[89] This will be followed by a 24-month term of probation with appropriate conditions. This results in a sentence which is in line with what I consider to be the similar case of *R. v. A.P.S.B.*[54]

[90] There will be a primary-designated-offence DNA collection order in accordance with s. 487.051 of the *Code*, and a *SOIRA* order which will commence immediately and run for twenty years in accordance with para. 490.013(2)(b) of the *Code.* There will be a mandatory s. 109 prohibition order. I find it necessary for the protection of minors to impose a s. 161 order of prohibition to run for twenty years, and which shall commence upon Mr. Deyoung's release from imprisonment. As this offence was committed after the in-force date of the *Safe Streets and Communities Act*, there are no benefit-of-

[53] (1991), 100 N.S.R. (2d) 447.
[54] Note 33, *supra*.

lesser-penalties issues as in *R. v. K.R.J.*[55] that I would need to deal with in relation to a s. 161 prohibition order. There will be a $200.00 victim-surcharge amount, with twenty-four months allowed for payment. There will be a non-communication order under s. 743.21 of the *Code*. The warrant of committal is to be endorsed that, while in custody, Mr. Deyoung is to have no contact or communication, directly or indirectly, with the victim. Her name is to be entered on the warrant, but is redacted from this decision in virtue of the s. 486.4 order.

Atwood, JPC

[55] 2016 SCC 31.