PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. A.B.*, 2024 NSPC 9

Date: 20240125
Docket: 8489984
Registry: Shubenacadie

Between:

His Majesty the King

v.

A.B.

Restriction on Publication: s. 486.4(1) of the Criminal Code

Judge: The Honourable Judge Mark Heerema

Heard: November 23, 2023, in Shubenacadie, Nova Scotia

Sentence: January 25, 2024

Charge: s. 171.1(1)(b) of the *Criminal Code*

Counsel: Alex Keaveny, for the Crown
Michelle James, for the Defendant

Restriction on Publication:
By court order made under subsection 486.4(1)of the Criminal Code, information that may identify the person described in this decision as the complainant (and/or) witness may not be published, broadcasted or transmitted in any manner. This decision complies with this restriction so that it can be published.

Introduction

[1] In his capacity as a Sea Cadet leader, A.B. began texting and communicating online with one of his young female cadets, C.D. This was not an 'approved' method of communication and A.B. knew that. Their communication lasted several months. During one of their online messaging sessions, he sent her a picture of his erect penis. She sent him a picture of her nude upper body. Eventually, this was discovered by the teen's mother, who contacted the authorities.

[2] A.B. pled guilty to one count of making sexually explicit materials available to a person under the age of 16 years for the purpose of facilitating the commission of an offence under s. 173(2), pursuant to s. 171.1(1)(b) of the *Criminal Code*.

[3] The issue before this Court is what is an appropriate sentence for A.B.

[4] The *Criminal Code* holds that where the Crown has proceeded by indictment, as it has in this case, the minimum punishment that must be imposed is a term of imprisonment for six months. A.B. submits that this violates his right under s. 12(d) of the *Canadian Charter of Rights and Freedoms* to be free from cruel or unusual punishment.

[5] He asks this Court not to apply the statutorily imposed minimum sentence and submits that three to six months of incarceration served in the community should be imposed, followed by 18 months of probation. He takes no issue with the ancillary orders sought by the Crown.

[6] The Crown submits that an appropriate sentence in this case is one of 18 months of incarceration, followed by two years of probation, a DNA order and a SOIRA order. In light of the Supreme Court of Canada's recent decision in *R. v. Bertrand Marchand*, the Crown takes no position on the application of A.B. to have this Court find that s. 171.1(2)(a) violates s. 12(d) of the *Charter* for reasonably foreseeable offenders.

[7] I will both begin and end this decision by consideration of the constitutional issue raised by A.B.

[8] A.B. provided the court with the following decisions: *R. v. Swaby*, 2018 BCCA 416; *R. v. John* 2018 ONCA 702; *R. v. Jeffrey Fulmore* (unreported decision of Judge Murphy); *R. c. H.V.*, 2022 QCCA 16; *R. v. Nur*, 2015 SCC 15; *R. v. Morrissey*, 2009 SCC 39; and *R. v. Lloyd*, 2016 SCC 130. A.B. argued that while no binding precedent has previously considered the constitutionality of s. 171.1(2)(a), a consideration of the submitted cases, which address "comparable"

provisions, should lead this court, either based on A.B. himself or a reasonably foreseeable offender to conclude that the mandatory minimum sentence offends the Constitution.

[9] While this Court has no ability to declare a law of no force or effect under s. 52(1) of the *Constitution Act, 1982*, it has the power to refuse to apply a law on the basis that it offends the Constitution. Given the need to use judicial resources appropriately, and mindful of the doctrine of mootness, I will only consider the constitutional issue if necessary (*Lloyd* at para. 18). Simply put, if I determine that the appropriate sentence for A.B. equals or exceeds the mandatory minimum, I will decline to consider the constitutional issue.

[10] Accordingly, I will now determine what I feel to be a fit and proportionate sentence for A.B. without regard for the mandatory minimum sentence contained within s. 171.1(2)(a).

The Facts

[11] When A.B. was 36, he began a relationship with C.D., a 15-year-old, female Sea Cadet. A.B. was one of her Sea Cadet leaders. The two exchanged numerous messages on emails and electronic messages during the fall of 2019. The Court

was not provided a copy of these messages but only a short description of their contents.

[12] The messages between A.B. and C.D. covered various topics of conversation. He teased her about being ticklish. He called her a teddy bear. He told her how he wanted to rub his hands on her legs after she complained of injuries she suffered. At one point during this time, A.B. sent C.D. a picture of his erect penis. C.D. sent A.B. a picture of her nude upper body.

[13] In one message, C.D. expressed to A.B. that she was contemplating taking her own life. A.B. reported this to his commanding officer and advised C.D. that he was going to get a slap on the wrist for speaking with her outside of approved channels.

[14] Their relationship ultimately was exposed by the mother of C.D., who saw a message sent by A.B., offering to drive C.D. to an interview for a staff cadet position.

[15] C.D. provided a Victim Impact Statement to the court. She detailed how these events caused her to lose focus at school and how she found it difficult to attend Sea Cadets. She described attending counselling afterwards and shared how she felt like she let down her family. She advised that while she does not fear A.B.

she fears facing him again for how it could bring back emotions that she has been trying to suppress.

Sexual Violence Against Children

[16] Our society and justice system are continually learning how damaging and injurious sexual abuse is against children. The harm it causes infiltrates not only the life of the victim, but also the lives of those who surround them. Unlike some purely physical harms, the effects do not necessarily dissipate with the passage of time, but rather, can take root and grow, and in so doing, disrupt and impair the full potential of the victim. If these truths were ever optional or debatable, that time has passed.

[17] This paradigm shift has been accomplished most forcibly by the Supreme Court of Canada's decision in *R. v. Friesen*, 2020 SCC 9. *Friesen* unequivocally ushers into Canadian jurisprudence a more demanding and robust conceptualization of the harmfulness and wrongfulness of sexual abuse against children.

[18] This case does not feature *physical* sexual contact between A.B. and C.D. It is limited to online activity. In *R. v. Bertrand Marchand*, 2023 SCC 26, the Supreme Court of Canada examined the offence of luring by means of

telecommunication. By its nature, that offence shares many similarities to the offence A.B. pled guilty to. In *Bertrand Marchand*, the Court espoused the following principles:

- Sexual abuse against children is not limited to instances of physical contact, but also includes abuse of children that occurs online (*Bertrand Marchand*, at paras. 32, 35, 48 & 75; *Friesen* at paras 46-49; 82 & 94).
- Children "*are particularly exposed and helpless online: the internet allows offenders direct, sometimes anonymous, and often secret or unsupervised access to children, frequently in the privacy and safety of their own homes*" (*Bertrand Marchand* at para. 34).
- Purely online offences have distinct harms from contact-offences as abusers can 'get into the head of the victim' and manipulate them in an unsupervised space. As the relationship with the adult is often cloaked under the guise of a positive relationship, it can impair the ability of the victim to trust people in the future. Moreover, victims are often made to feel responsible for their participation in online offences, increasing their sense of self-blame (*Bertrand Marchand* at paras. 38 & 39).
- Often online offences involve the grooming of the child. "*Grooming is a process which allows the offender to forge a close relationship with a victim to gain trust, compliance and secrecy for the purpose of eventually engaging in sexualization and abuse*" (*Bertrand Marchand* at para. 51). Grooming is not an element of luring (or the offence of making sexually explicit materials available to a child); however, its presence can aggravate.
- Where an accused uses "*a pre-existing relationship in order to exploit pre-existing trust*", a breach of this trust is "*likely to increase the harm to the victim and thus the gravity of the offence*" (*Friesen*, at para. 126; *Bertrand Marchand* at para. 82).
- The offence of luring is an "*inchoate preparatory offence to criminalize sexualized communications with children that precede or pave the way for the perpetration of other offences set out in the Criminal Code*." (*Bertrand*

> *Marchand* at para. 8). The offence of luring requires an accused to intend to commit a secondary, distinct offence. Given the nearly identical statutory language between s. 172.1 and 171.1, I take the Supreme Court of Canada's guidance to be applicable to the offence of making sexually explicit material available to a child (*Bertrand Marchand* at paras. 6-15).

Principles of Sentencing

[19] The task of a judge at sentencing is to apply the general purpose, objectives and principles of sentencing as set out in ss. 718 to 718.3 of the *Criminal Code* to determine a "fair, fit and principled sanction" (*R. v. Parranto,* 2021 SCC 46, para. 10). The dexterity required to achieve a just result is difficult and reflects why sentencings are considered "one of the most delicate stages of the criminal justice process in Canada" (*R. v. LaCasse,* 2015 SCC 64, para. 1). Sentencing is a highly individualized process responsive to the unique circumstances of the offence and offender (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, paras. 91-92).

[20] A sentence must protect the public and contribute to respect for the law and the maintenance of a safe society by imposing just sanctions that target one or more of the statutory objectives listed in s. 718. Depending on the nature of the offence, certain objectives may need to take prominence in the determination of an appropriate sentence.

[21] In the case of sexual abuse of youth, the paramount sentencing objectives are denunciation and deterrence (ss. 718.01; *Friesen* at paras. 104-105). This choice

reflects a reasoned response to clearly communicate the harmfulness and wrongfulness of sexual violence against children by adults. The prioritization of denunciation and deterrence does not extinguish other objectives, such as rehabilitation of the offender, but does ensure that they remain subordinate considerations (*Bertrand Marchand* at para. 28). The objective of deterrence is aimed at both Canadian society-at-large, as well as at the offender, individually.

[22] A fit sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1). Proportionality is the "organizing" principle in the determination of a just sentence (*Parranto,* para. 10).

[23] There remain various secondary sentencing principles applicable to this case which a court must strive to achieve in sentencing.

[24] First, a fit and proportionate sentence should be responsive to aggravating or mitigating circumstances of the offence (s. 718.2(a)).

[25] Second, the principle of "parity" holds that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstance (s. 718.2(b)). Parity works constructively, not antagonistically, to the proportionality principle. Simply put, a consistent approach to proportionality

should lead to similar sentences in similar cases, while simultaneously enriching and promoting existing precedents (*Friesen*, paras. 32-33.).

[26] Finally, a sentence should honour the principle of restraint and a court should not impose incarceration if something less restrictive would be appropriate (s. 718.2(d) and (e)).

What is a Fit and Proportionate Sentence for A.B.?

[27] I begin my analysis by recognizing the inherent wrongfulness and harmfulness of providing sexually explicit materials to a 15-year-old. I am mindful of the many and varied harms that this kind of offending can produce as most recently noted by the Supreme Court of Canada in *Friesen* and *Betrand Marchand*.

[28] I find the following to be aggravating circumstances in this case:

- A.B. stood in a position of trust in relation to C.D. as her cadet leader (s. 718.2(a)(iii); *Bertrand Marchand* at paras. 82-84)
- There was an age gap of 21 years between A.B. and C.D. Given that C.D. was 15-years-old at the time of this offence, this is a significant difference in age (*Bertrand Marchand* at para. 87).
- There were multiple messages and emails exchanged between A.B. and C.D. (*Bertrand Marchand* at para. 77). Relatedly, A.B. was aware these messages were outside of "approved channels" given his status as a cadet leader to C.D.

- While there was only one image sent by A.B. to C.D., there was evidence that he sent messages which alluded to him touching her (e.g., rubbing her) or her being ticklish. Despite not being graphic or explicit, this softer form of communication can be harmful and is inappropriate (e.g., *Bertrand Marchand* at para. 78).
- The offence had a significant impact upon the victim, disrupting various aspects of her life. This offence came at a particular fragile and vulnerable time in her life as she struggled with suicidal thoughts.

[29] I find the following to be mitigating circumstances in this case:

- A.B. has pled guilty. By doing so, he has spared the victim the necessity of testifying.
- A.B. took responsibility for his actions in the face of the Crown's case reportedly having some evidentiary challenges.
- A.B. appears to be genuinely remorseful for his actions. I note the following from the pre-sentence report:

> *A.B. accepts responsibility for the offence before the Court and claims that it was a "stupid mistake" on his part and that he wasn't thinking of the severity of his actions during the offence. Throughout the interview process, A.B. did not try to rationalize or deny the offence and does appear to be genuinely remorseful. A.B. stated that he "is not sure of how his actions have affected others, but that he holds a great deal of shame and remorse." A.B. also stated "I will never do anything like this again and I want to move pass (sic) this point in my life."*

- Finally, I note that A.B. comes before the Court without a prior criminal record and has been gainfully employed for years.

[30] I wish to make two other comments about the facts of this case.

[31] First, respecting the issue of grooming, I am not satisfied this has been proven as an aggravating circumstance by the Crown. While, by virtue of the plea, and the wording of s. 171.1(1)(b), I accept that A.B. provided the picture of his penis for the purpose of facilitating the commission of an additional offence, I am not satisfied the evidence makes out grooming *per se*. My finding follows from

the guidance given by the Supreme Court of Canada in *Bertrand Marchand* at para 53:

> In assessing whether grooming is present, judges should focus on the character, content, and consequences of the messages, as well as whether the communication resulted in psychological manipulation of the child.

[32] There is certainly a likelihood that grooming was attempted; however, I am ultimately left with insufficient facts to determine this as aggravating beyond a reasonable doubt.

[33] Second, I note that the relationship between A.B. and C.D. involved her sending him an image of her naked upper body. It is unclear whether this image was shared before or after he sent C.D. a picture of his erect penis, and moreover, whether it was solicited or unsolicited. It must be clearly understood that an image depicting the bare breasts of a 15-year-old female can constitute child pornography (e.g., *R. v. "Y",* 2015 NSPC 14 at paras. 12-21).

[34] When an adult chooses to engage in a relationship with a youth, good policy dictates that it is the adult, not the youth, who is responsible for preventing sexual activity between them (e.g., *R. v. George*, 2017 SCC 38 at para. 2 and *Friesen* at para. 154). A.B. is not being sentenced for possession of child pornography and nor am I finding this to be an aggravating circumstance for the offence he is being sentenced for. Nevertheless, the fact that C.D. shared an intimate image of herself

with A.B. poignantly illustrates the harmfulness and wrongfulness of when an adult sexualizes a relationship with a child.

The Degree of Responsibility of A.B. and His Circumstances

[35] A Pre-Sentence Report was prepared, which explored A.B.'s personal circumstances.

[36] He is presently 42 years of age. His parents divorced when he was five years of age, and he was raised primarily by his mother. He reported that he enjoyed a normal upbringing and was involved with Air Cadets and Boy Scouts in his youth. He does not have children and is not presently in a serious relationship. He has a good relationship with his family although they remain unaware of the matters before the court.

[37] A.B. has a university degree from Mount St. Vincent University. He presently works as a manager at a local grocery store. He is financially stable and secure.

[38] A.B. has some health challenges, including Diabetes, blood clots, a learning disability, and Attention Deficit Hyperactive Disorder (ADHD). He does not use drugs or smoke cigarettes, and drinks only on occasion.

[39] As noted above, A.B. expressed regret and remorse to the author of the Pre-Sentence Report. He believes that counselling will benefit him.

[40] In looking at the degree of responsibility that A.B. bears for this offence, his counsel offered that his diagnosis of ADHD may be a partial explanation for this offence, most notably the impulsive nature of it. While this may be possible it is difficult to fully accept given the relative length of the relationship.

Range of Sentences for s. 171.1(1)(b) Offences

[41] The Crown submits for this type of offence, the law supports a range of three to five years of incarceration as a fit and proportionate sentence. Considering the mitigating factors present, the Crown advised they are only seeking a period of 18 months. In advancing this range, the Crown relies upon the following decisions:

> ***R. v. Jissink,*** 2021 ABQB 102 – The accused pled guilty to one count of luring. He was 43 years-old at the time of the offence and was a teacher at the school of the 16 year-old victim. The accused and the victim would talk occasionally while smoking. The accused added her to SnapChat and over the next few months messaged with her. He sent images of himself with words overlaid saying, "You're hot" and "LOL, I wanna fuck you." He apologized the following day and said he was intoxicated when he sent them. It was agreed that the accused had sent similar messages to another student. He was sentenced to 12 months of incarceration followed by 2 years of probation.
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> ***R. v. Moolla,*** **2021** ONSC 3702 – The accused was found guilty of luring, making sexually explicit materials to a child and breaching probation. The accused placed an ad online seeking a sexual relationship with a girl, "at

> least 16 years and at most 19". An undercover officer, posing as a 14 year-old girl named "Addison" replied. Lengthy text messages occurred over the following two days, and plans were made for the two to meet near the accused's condominium. The messages included the accused graphically describing their anticipated sexual activity, and one message included a picture sent by the accused of his penis. The accused was arrested walking toward where he anticipated meeting Addison. The accused had a prior unrelated criminal record and was 35 years old at the time of sentencing. He was sentenced to three and a half years of imprisonment.
>
> ***R. v. Mootoo,*** 2022 ONSC 384 – The accused met the 15-year-old victim online. Within days, she stayed over at his apartment for a night. He was found guilty of "*attempting to procure a child under the age of 18 to provide sexual services for money, possessing child pornography, possessing child pornography for the purpose of distribution, making sexually explicit material available to a person under the age of 16, luring a child under the age of 16, and inviting a person under the age of 16 to touch herself in a sexual manner*." He had a prior unrelated criminal record and was sentenced to three and a half years of imprisonment.

[42] The Defence questions the range offered by the Crown and points to the discussion in *R. v. Hood*, 2018 NSCA 18 at paras. 150-154. In these passages, the Nova Scotia Court of Appeal addressed a hypothetical case of a female teacher in her late twenties who, while suffering from mental health challenges (bipolar mood disorder) and feeling manic, texted a 15 year-old male student. The student and teacher met that same evening and "fondled" each other. The Court of Appeal varied the hypothetical scenario slightly to also consider how this offence pattern would be assessed with a 17-year-old victim. At para. 154 of *Hood* the Court noted:

> [I]t is unlikely that any of these hypothetical crimes would even draw jail time. Instead, based upon our judicial experience, we would expect to see a suspended sentence with a term of probation (with strict conditions) or at most, a brief period of incarceration and probation (also with strict conditions).

[43] Importantly, this passage pre-dated the Supreme Court of Canada's guidance in *Friesen* and is no longer instructive (*Bertrand Marchand* at para. 124). Moreover, the use of the word "fondle" was criticized by the Supreme Court of Canada as effectively minimizing and trivializing the wrongfulness and harmfulness of this conduct (*Friesen* at para. 144; *Bertrand Marchand* at para. 67).

[44] I add the following cases to my consideration of the principle of parity:

> ***R. v. Allen,*** 2018 ONSC 252 — The 50 year-old accused was convicted of four counts of luring and one count of making sexually explicit materials available to a child. The convictions related to an online conversation the accused had with an undercover police officer. The accused recommended specific hard and softcore pornography websites to who he believed was a 14 year-old girl. The accused challenged the constitutionality of the mandatory minimum punishment of 90 days of imprisonment (as the matter was proceeded with summarily). The accused argued that all he did was recommend websites, and that given that the victim was not "real," a fit and proportionate sentence fell below the ninety day minimum punishment. The court disagreed and imposed a period of 90 days of custody.
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> ***R. v. Demers,*** 2020 QCCQ 2656 – The accused was 21 years-old while conversing with a police officer, posing as a 13 year-old female. The communications occurred over many months. He sent seven photos of his penis, with the intention to exciting her and inviting her to have sex. The accused pled guilty and had no prior record of offending. The accused was sentenced to three months of custody, followed by two years of probation.
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> ***R. c. Brunet,*** 2023 QCCQ 5562 – The 23-year-old accused was the karate instructor of the 16 year-old victim. Over numerous months, texts of a

sexual nature were exchanged, including photographs and videos of masturbation. The court found the mandatory minimum sentence of six months under s. 171.1(2)(a) to be unconstitutional and imposed a sentence of two years less one day to be served in the community.

R. v. Blood, 2019 PESC 32 – The accused pled guilty, mid-trial, to making sexually explicit material available to a person under the age of 16 years. Over a 3 month period, the accused, who was 35 years-old, and a police officer, posing as a 15 year-old female, exchanged emails and text messages. The accused sent nine photographs "*of his genital area and in particular a male's erect penis, accompanied by various comments*." The accused had a dated, minor, and unrelated criminal record. He was sentenced to 10 months of custody, followed by three years of probation.

R. v. Sutherland, 2019 NWTSC 45 – The accused was the gymnastics coach of the 17 year-old female victim. He engaged in a series of electronic text messages with her, including suggestive texts. In one message, he sent a picture of him, bare-chested with his penis exposed. The accused was 50 years-old the time of sentencing. He had no record and pled guilty on the morning of his trial. The court imposed a sentence of 12 months of custody.

R. v. Bertrand Marchand, 2023 SCC 26 **–** The accused was 22-years-old, and the victim was 13 years-old when they began a relationship that lasted for two years. They had sexual intercourse on four occasions – which was the basis for one count of sexual interference that the accused pled guilty to. He also pled guilty to one count of luring for online communication that occurred when he was 24 and the victim was 15 and spanned approximately seven months. At trial, the judge sentenced the accused to 10 months of custody for the sexual interference, and after finding that the mandatory minimum punishment in s. 172.1 was unconstitutional, imposed a period of 5 months of custody, concurrent for the luring. The Quebec Court of Appeal dismissed an appeal by the Crown. The Supreme Court of Canada agreed that the mandatory minimum was unconstitutional in relation to a reasonably foreseeable offender but increased the luring sentence to 12 months of custody, consecutive.

Analysis and Conclusion

[45] The sentencing of A.B. must be guided by the compendious decisions of the Supreme Court of Canada in *Friesen* and *Bertrand Marchand.* These decisions are clear and unambiguous in directing Canadian courts to understand and acknowledge the wrongfulness and harmfulness of the sexual abuse of children in Canada by adults. A.B., a trusted adult in the troubled life of C.D., exploited and objectified her by sending her a picture of his erect penis. She was vulnerable. He was trusted by her.

[46] C.D. has suffered from the conduct of A.B., that is clear; however, the full extent of her suffering remains to be seen. It is sad that C.D., traversing a tough time in her childhood, aligned herself to a trusted adult who looked past her humanity and focused more on his own sexual gratification than her wellbeing. This objectification is demeaning to the inherent dignity of C.D.

[47] Having said this, I accept that A.B. is genuinely remorseful. He has accepted responsibility. I believe he deeply regrets his conduct. He is a man without a criminal record, and I can and do infer that this behaviour is out of character. Moreover, I believe that he would be amenable to receiving counselling to examine what led him down this path. Rehabilitation of A.B. is an important component of a sentence that I will impose.

[48] Despite this, I believe that a period of custody is required. I respectfully disagree with the defence that a period of actual custody is not required. This is a decision that I have not come to easily, lightly or without anguish.

[49] Despite the mitigating factors present in this case, I believe that a conditional sentence would not be consistent with the fundamental purpose and principles of sentencing set out in the Criminal Code.

[50] I accept that the Supreme Court of Canada, along with Parliament's systematic increases in sentences pertaining to sexual violence against children, mandates a period of actual custody in this case. Our highest court has not asked sentencing courts to merely acknowledge the attendant harms and wrongs of this conduct, but to manifest this awareness through increased sentences (*R. v. T.J.*, 2021 ONCA 392 at para. 39). A clear message must be sent to A.B. and to all members of society that children are off-limits sexually, especially to those who are trusted adults in their lives.

[51] It bears noting that our society vitally depends on organizations wherein children can trust adults. Such organizations and activities enrich the lives of our children. Great damage is done to the fabric of our society when children are sexualized in such circumstances. When adults trespass upon the right of children

to be free from exploitation in these childhood involvements, they can expect that the justice system's answer will focus on denouncing and deterring their behavior. Such sentences are merely one part of a broader societal response needed to keep children safe.

[52] I find that the existing authorities do not support the three to five year range the Crown advanced. I believe the closest cases, factually, to this one includes *Blood*, *Sutherland, Jissink*, and *Brunet*.

[53] The existing sentences must be located within the Supreme Court of Canada's recent jurisprudence. As discussed above, our Court of Appeal's guidance in *Hood* on non-custodial sentences for similar offences has been explicitly rejected by our Supreme Court of Canada. Similarly, in *Brunet* the Court of Quebec relied upon the Quebec Court of Appeal's affirmation of a five- month period of custody to be served concurrently in *R. v. Bertrand Marchand*, 2021 QCCA 1285. As noted above, the Supreme Court of Canada strongly disagreed with that sentence and opted to impose a sentence of 12 months custody to be served consecutively.

[54] I believe that an appropriate sentence in this case is one of 12 months of custody, followed by two years of probation.

[55] In addition to the mandatory terms of probation, the following conditions will apply:

- Report to a probation officer within three days of the expiration of your sentence of imprisonment and thereafter when required and in the manner directed by your probation officer.
- Undergo and successfully complete any psychiatric, psychological, or mental health counselling directed by your probation officer.
- Do not contact or communicate with, or attempt to contact or communicate with, directly or indirectly, C.D.
- Sign all consents required by service providers to release information on your participation in any assessment, counselling, or programs to permit the probation service to monitor your progress.

[56] I will impose an order authorizing the taking of A.B.'s DNA, pursuant to s. 487.051.

[57] I further impose under section 743.21 of the *Criminal Code* that A.B. have no contact or communication with C.D. while serving his period of imprisonment.

[58] The Crown is seeking a SOIRA order. Section 490.012(3) states that the Court shall make a SOIRA order unless the accused can satisfy one of the exceptions, informed through the factors identified in s. 490.012(4). The defence does not contest the imposition of a SOIRA order in this case. Pursuant to s. 490.013(2)(b), the duration of that order shall be for 20 years.

[59] Pursuant to s. 737, and having considered A.B.'s financial circumstances, I will impose a victim fine surcharge of $200 for which A.B. shall have 12 months to pay.

[60] I return to the application by A.B. to have this court declare that the mandatory minimum in s. 171.1(2)(a) is unconstitutional in his case. I have found that a proper and fit sentence for A.B. exceeds the mandatory minimum sentence of 6 months.

[61] This leaves open whether s. 171.1(2)(a) offends the constitution for reasonably foreseeable offenders. Given that this Court is one statutory jurisdiction, and that my answer to that question would not result in a declaration of invalidity, as noted at the outset of my decision, I will decline to address it for the reasons identified by the Supreme Court of Canada in *Lloyd*.

Mark Heerema, JPC