*R v Lafferty,* 2019 NWTSC 38 File # S-1-CR-2018-000031, S-1-CR-2018-000033

# IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**DALTON LEE LAFFERTY**

**Transcript of the Reasons for Sentence of the Honourable Justice**

1. **A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 20th day of August, 2019.**

# APPEARANCES:

1. Chertkow: Counsel for the Crown

C. Davison: Counsel for the Defence

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Charges under s. 271 of the Criminal Code of Canada

**There is a ban on the publication, broadcast or transmission of any information that could identify the complainants pursuant to s. 486.4 of the Criminal Code.**

# I N D E X

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# OPENING STATEMENT BY THE COURT:

1. THE COURT: Mr. Lafferty has pleaded guilty to two
2. counts of sexual assault, and I must now sentence him
3. for those offences. Because both victims were under
4. 16 at the time of the events, a mandatory minimum
5. penalty of one year on each count applies, pursuant to
6. s. 271(1)(a) of the *Code.*
7. The defence challenged this mandatory
8. minimum penalty as contrary to the *Charter.* I have
9. concluded that it does contravene the *Charter.* My
10. decision on Mr. Lafferty's matter is not affected by this
11. decision, because both Crown and defence presented
12. submissions to the effect that the appropriate sentence
13. would be in excess of that mandatory minimum, in any
14. event.
15. Both charges arise from Mr. Lafferty having had
16. sexual intercourse with girls who were, in law, unable to
17. give valid consent to sexual activity. The law sets that
18. age at 16 years old. There are certain close-in-age
19. exceptions, where sexual contact with a person under
20. 16 is not a crime, but those are not engaged here.
21. Situations like those that arose in this case are
22. sometimes described as cases where there is "*de*
23. *facto*" consent. They engage specific issues, and this
24. case presents an opportunity for this court to address
25. them.
26. I will first refer to the facts of these charges, as 1
    1. alleged by the Crown and admitted by Mr. Lafferty at
    2. the sentencing hearing.
    3. The first victim, P.G., was 14 years old in June
    4. 2017. Mr. Lafferty was 25. P.G. was walking around
    5. the community one evening and ran into Mr. Lafferty.
    6. He offered her alcohol. They drank two mickeys of
    7. vodka together. Later that evening, the two had sexual
    8. intercourse at his house. The next day, after she
    9. sobered up, she left his residence.
    10. The second victim, K.M., was also 14 years old,
    11. in the summer of 2017. The circumstances involving
    12. the offences against her are different. In her case, the
    13. sexual activity occurred many times over several
    14. months. During the months of June to September
    15. 2017, K.M. and Mr. Lafferty were in a relationship, and
    16. had sexual intercourse a number of times. Sometimes
    17. he wore a condom, and other times he did not.
    18. On one occasion, during the month of August,
    19. Mr. Lafferty threw her to the ground, got on top of her,
    20. and choked her. I was not told any other details about
    21. how this came about.
    22. The agreed statement of facts do not set out the
    23. particulars of how these events came to the attention of
    24. the authorities, but eventually Mr. Lafferty was charged.
    25. He was charged separately for each incident.
    26. He elected to have his trial by a judge and jury and to
    27. have a preliminary hearing. The preliminary hearings

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1. proceeded. P.G. and K.M. testified at those hearings.
2. Jury trial dates were set for both matters.
3. The first of the two was scheduled to commence
4. on November 19th, 2018. On November 16, Mr.
5. Lafferty changed his plea to guilty on that matter, as
6. well as on the other one. Sentencing was adjourned for
7. the preparation of a pre-sentence report and was
8. delayed a bit more than usual, because the Crown and
9. defence needed time to prepare materials on the
10. constitutional challenge to the mandatory minimum
11. penalty.
12. Turning to Mr. Lafferty's circumstances, he is
13. now 27 years old, and he is of Métis descent. At the
14. time of these events, he did not have a criminal record.
15. He has since been convicted of three breaches of the
16. process he was on after being charged with the
17. offences now before me. Two were breaches of a
18. condition that he abstain from consuming alcohol, and
19. one was a breach of a no-contact order with respect to
20. K.M.
21. The pre-sentence report that was prepared is
22. thorough, and it provides a lot of information about the
23. circumstances of Mr. Lafferty, including information that
24. is relevant to the framework I'm required to apply when
25. sentencing an Indigenous offender. I will not refer to
26. everything that's in the report, but I have considered it
27. carefully.

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* 1. It is clear that Mr. Lafferty faced very difficult
  2. circumstances growing up. His father was physically
  3. abusive to his mother. His mother eventually began a
  4. relationship with someone else. There was a lot of
  5. alcohol abuse in the home, and Mr. Lafferty says that
  6. during those years, he was sexually abused by various
  7. people.
  8. Because of the dysfunctional environment at his
  9. home, Mr. Lafferty was apprehended and placed in
  10. foster care. Sadly, he was physically abused by the
  11. person whose care he was placed in. His mother
  12. eventually stopped drinking completely, and then he
  13. returned living with her.
  14. When he was 18, his mother moved to Fort
  15. Smith. At that point, Mr. Lafferty moved in with Ronald
  16. McKay, a man who is described in the report as having
  17. been a father figure for him. Mr. Lafferty lived with Mr.
  18. McKay and his wife for three years. Mr. Lafferty was
  19. involved with sports, coaching soccer to youth. Mr.
  20. McKay appears to have been a solid, positive force in
  21. Mr. Lafferty's life. Mr. McKay and his wife are still
  22. supportive of him.
  23. Hopefully, Mr. Lafferty will be able to make the
  24. most of that support when he is released from custody,
  25. because clearly Mr. McKay and his wife saw, and still
  26. see, a lot of good in him, and believe in his potential.
  27. The best outcome for Mr. Lafferty and for his 4
      1. community would be for him to find a way to develop
      2. and use that potential for good things and for
      3. constructive things. He could help others through their
      4. struggles, because he understands what it means to
      5. struggle.
      6. Mr. Lafferty started consuming alcohol when he
      7. was 12. By the time he was 18, according to Mr.
      8. McKay, Mr. Lafferty was drinking heavily. Now, Mr.
      9. Lafferty describes himself as a functional alcoholic. He
      10. acknowledges that his substance abuse problem has
      11. caused him a lot of issues in his life.
      12. I cannot not mention the fact that some of the
      13. things that Mr. Lafferty told the author of the pre-
      14. sentence report about these offences are of concern,
      15. because they indicate a complete lack of insight into his
      16. behaviour. For example, at page 3, the author of the
      17. report writes, and I quote:
      18. He appears not to understand age of consent,
      19. and maintains that his interaction with victims
      20. was consensual. When asked how he thought
      21. the victims may be feeling, he responded that
      22. they are probably feeling badly for getting him
      23. incarcerated. When asked how he is feeling
      24. about his sexual assault charges, he said, "I am
      25. sorry and ashamed of these charges, and I feel
      26. bad about the situation I am in. It is not in my
      27. personality to be facing these charges, and it 5
          1. feels it is unjust that I am presently
          2. incarcerated."
          3. Later in the report, on page 8, the author writes that:
          4. Dalton views himself as a charismatic person
          5. who is a leader and not easily influenced. The
          6. subject believes people like him, because he is
          7. honest, trustworthy, and smart. When asked
          8. about his weaknesses, he could not think of
          9. anything outside of his substance use.
          10. At the sentencing hearing, both counsel made
          11. comments about those portions of the report, not
          12. surprisingly. Mr. Lafferty's counsel advised that in his
          13. discussions with him, Mr. Lafferty made it clear to him
          14. that he now understands the age of consent for sexual
          15. activity is 16, and he understands why that is. When he
          16. was given an opportunity to speak at the conclusion of
          17. submissions, Mr. Lafferty told the Court that he is sorry
          18. for what he did, that he did not realize the harm that his
          19. behaviour had caused, and that now he does.
          20. The report was prepared in February 2018.
          21. Several months passed between then and the
          22. sentencing hearing in July 2018.
          23. I hope that it is true that Mr. Lafferty now
          24. understands the harm he has caused and the
          25. seriousness of his behaviour. I hope that he has
          26. thought a lot about this, and will continue to think about
          27. it, about why he had these kinds of interactions with 14-

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1. year-old girls, and about how he used alcohol in his
2. interactions with them. I hope he comes to see that this
3. is, in fact, very predatory behavior, that the
4. responsibility of his situation is his and his alone, and
5. that adults are the ones who have the ultimate
6. responsibility not to allow things like this to happen.
7. I do not know Mr. Lafferty, but if it is true that he
8. is charismatic, and that people tend to like him, then he
9. needs to be very careful about how he conducts
10. himself around younger people. That is, as I said, a
11. responsibility that all adults have. Mr. Lafferty is an
12. adult. He is a man, and he needs to act like one.
13. The Crown's position is that a global sentence of
14. three and a half years should be imposed on the
15. charge on these matters. Initially, the Crown suggested
16. three and a half years on the charge relating to K.M.,
17. and three years concurrent on the charge relating to
18. P.G.
19. But concurrent sentences cannot be imposed for
20. these charges. The Crown acknowledges that despite
21. this, the global sentence should still be three and a half
22. years. In other words, the Crown is suggesting that
23. each sentence should be adjusted to arrive at that
24. global sentence, given that concurrent sentences
25. cannot be imposed.
26. Defence suggests that a global sentence
27. between 27 and 30 months should be imposed. 7
    1. Defence suggests that a breakdown of 18 months'
    2. imprisonment for the charge regarding K.M. and nine to
    3. 12 months consecutive for the charge regarding P.G.
    4. As far as the global sentence to be imposed, Crown
    5. and defence are not that far apart.
    6. They also agree that Mr. Lafferty should be
    7. credited for the time he has already spent in custody,
    8. and agree that this credit should be on the usual ratio of
    9. one-and-a-half-day credit for each day spent in pre-trial
    10. custody. As of July 8th, I was advised that he had
    11. spent a total of 444 days on remand. Since then he
    12. has spent a further 43 days for a total of 487 days.
    13. Credited at a ratio of a day-and-a-half for each day,
    14. which is what Crown and defence agree I should do,
    15. this adds up to credit for 730 days, which is roughly two
    16. years.
    17. The fundamental sentencing principle is
    18. proportionality. A sentence must be proportionate to
    19. the seriousness of the offence and the degree of
    20. responsibility of the offender.
    21. Mr. Lafferty is Indigenous, and this engages the
    22. principle of restraint in a particular way, as was
    23. explained by the Supreme Court of Canada in *R. v.*

24 *Gladue,* [1999] 1 S.C.R. 688, and *R. v. Ipeelee,* 2012

1. SCC 13. These principles are rooted in the recognition
2. of the disadvantages that Indigenous peoples have
3. been subjected to historically, the consequences that 8
   1. this has had on these people, and how it has resulted in
   2. Indigenous people being overrepresented in Canadian
   3. jails.
   4. The underlying objective of these principles is to
   5. address the issue of that overrepresentation. I'm
   6. required to take judicial notice of background and
   7. systemic factors that have had an impact on
   8. Indigenous people in this country and contributed to
   9. their overrepresentation in jails, and I have done so.
   10. I'm also required to take into account specific
   11. things from Mr. Lafferty's background that have had an
   12. impact on him and have a bearing on his level of
   13. blameworthiness. In this case, there is ample evidence
   14. about Mr. Lafferty's upbringing and circumstances that
   15. is relevant in that regard. The dysfunctional
   16. environment he grew up in; the abuse he witnessed
   17. and was subjected to; the lack of stability arising from
   18. substance abuse issues; and domestic violence that
   19. were part of his life from the very beginning are the
   20. types of things that we sadly often hear about in
   21. sentencing hearings involving Indigenous offenders.
   22. I am satisfied that these things reduce his
   23. degree of blameworthiness. That is not to say it
   24. excuses the conduct or makes it any less serious. It
   25. simply means that some of the struggles he has faced
   26. have an impact on his moral blameworthiness.
   27. The Crown relies on the Alberta Court of Appeal 9
       1. decision in *R. v. Hajar,* 2016 ABCA 222, which set a
       2. starting point of three years' imprisonment for what the
       3. Court called in that case, "major sexual interference."
       4. Here we are dealing with a sexual assault
       5. charge, not a sexual interference charge, but the
       6. operative principles are the same, because these
       7. particular sexual assaults were committed on young
       8. persons, and in that respect, even though the elements
       9. of the two offences vary slightly, in effect there is
       10. considerable overlap between the behaviours that are
       11. captured by these offences.
       12. Defence has argued that starting points
       13. established by the Alberta Court of Appeal should not
       14. mechanically be applied by courts in the Northwest
       15. Territories. Defence points out that in this jurisdiction,
       16. the principles that govern the sentencing of Indigenous
       17. offenders have particular significance, given the
       18. makeup of our population.
       19. In *Hajar,* the majority gave a number of reasons
       20. why it considered it was necessary to have a starting
       21. point in major sexual interference cases, at paragraph 22 71 to 80.
4. These included, among others, the wide
5. disparity in sentencing of these types of matters, which
6. reflected widely disparate views among sentencing
7. judges as to the gravity of such offences, when the
8. child was a so-called “willing participant”. The majority

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1. was concerned about sentencing judges treating the
2. child's "willingness" to participate, as a mitigating factor
3. -- and by some judges as a very mitigating factor -- on
4. sentencing.
5. The Court noted that there have been starting
6. points in place in Alberta for many years for major
7. sexual assaults on adults, and found that it would be
8. illogical not to have a starting point for major sexual
9. assaults on children, who everyone acknowledges are
10. especially in need of protection. The Court noted as
11. well that a starting point exists for major sexual assaults
12. on children by people acting in the position of a parent.
13. All these reasons are equally valid reasons to
14. have a starting point for this category of offence in the
15. Northwest Territories.
16. I agree with defence that, in the North, we have
17. a high percentage of cases where the principles
18. outlined in *Gladue* and *Ipeelee* are engaged and
19. probably quite a bit higher than all other jurisdictions in
20. the country, except maybe for Nunavut and Yukon.
21. But starting points are not minimum sentences.
22. They are a yardstick that reflects the inherent
23. seriousness of a certain type of offence, and where the
24. sentencing court's analysis should begin in its
25. proportionality analysis. Inherent in the notion of a
26. starting point is that the sentence must be adjusted to
27. reflect both aggravating and mitigating features of the

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1. case. It must also be adjusted to reflect the particular
2. level of blameworthiness of the offender before the
3. court, because ultimately, the objective is the imposition
4. of a proportionate sentence.
5. Because of this, starting points do not determine
6. what the sentence will be. They simply are an
7. indication of the objective seriousness of certain
8. conduct, and of the inherent blameworthiness that
9. attaches to it. They do not preclude, but on the
10. contrary, require, adjustments to reflect aggravating
11. and mitigating factors, as well as things that reduce the
12. blameworthiness of the specific offender who is before
13. the court.
14. In my view, the existence of a starting point, if its
15. application is properly understood and implemented,
16. does not prevent honouring the principles set out in
17. *Gladue* and *Ipeelee.* For those reasons, I see no
18. reason not to adopt the starting point set out in *Hajar* in
19. this jurisdiction, and I have, for the purpose of this case.
20. That said, I must add that establishing starting points is
21. the role of appellate courts, not trial courts. It will be for
22. our Court of Appeal, if and when it is seized with this
23. issue, to address it more fully.
24. Quite apart from the starting point issue, one of
25. the core propositions that *Hajar* stands for is that
26. ostensible consent -- the majority in *Hajar* prefers that
27. term to *de facto* consent, and so do I -- should not be 12
    1. treated as a mitigating factor on sentencing. Treating it
    2. as a mitigating factor appears to be based on the
    3. assumption that the harm to the child has somehow
    4. lessened by the fact that the child was a "willing
    5. participant." The majority decision in *Hajar* explains
    6. why this assumption is wrong and gives several other
    7. reasons why ostensible consent should not be treated
    8. as a mitigating factor. That's at paragraphs 84 to 103
    9. of that decision.
    10. I agree with the majority's comments in this
    11. regard.
    12. Having concluded that a three-year starting point
    13. is appropriate in these cases, and bearing in mind that
    14. P.G. and K.M.'s ostensible consent is not a mitigating
    15. factor, I turn to the aggravating and mitigating factors
    16. that are present here.
    17. First, dealing with the mitigating factors. I have
    18. already mentioned that by operation of the principles
    19. set out in *Gladue* and *Ipeelee,* Mr. Lafferty's moral
    20. blameworthiness for these offences is reduced.
    21. Another mitigating factor is his guilty plea on
    22. both charges. As I often say, guilty pleas are very
    23. important in cases like this, because they spare victims
    24. from having to testify. They provide certainty of
    25. outcome. They are an opportunity for the offender to
    26. acknowledge his or her wrongdoing and show remorse.
    27. Here, the comments that Mr. Lafferty made to the 13
        1. author of the pre-sentence report do not suggest
        2. remorse. On the contrary, they are, as Crown counsel
        3. noted, very much in the category of victim-blaming.
        4. But his comments at the sentencing hearing do
        5. suggest remorse. I express hope that those
        6. comments, and what he told his lawyer, were genuine
        7. and that he now truly does understand the harm he has
        8. caused, but one way or another, the fact is that his
        9. guilty pleas have avoided two jury trials, and spared
        10. these teenager girls a lot. Again, as I have often
        11. occasion to say, for having seen countless witnesses,
        12. adults and young persons, go through the process of
        13. testifying in a sexual assault trial, I am acutely aware of
        14. how difficult and painful that can be.
        15. In assessing the weight of the guilty plea as a
        16. mitigating factor, the timing of the plea is a factor, and
        17. these were not early guilty pleas. They came very
        18. close to the date set for the first jury trial and after
        19. preliminary hearings where both girls had to testify.
        20. Counsel had slightly different takes on what
        21. happened at the preliminary hearings.
        22. Defence counsel, who was not counsel at the
        23. preliminary hearing, said that his understanding was
        24. that the cross-examination at those hearings was very
        25. focused in that these witnesses were not subjected to
        26. prolonged questioning. Crown counsel, who was
        27. counsel at the preliminary hearing, noted that K.M. 14
            1. became distraught during the hearing.
            2. I reviewed both preliminary hearing transcripts.
            3. It is true that in neither case, there was prolonged
            4. questioning. P.G. was asked mostly questions about
            5. her drinking, and there is nothing on the transcript that
            6. suggests that this was a particularly lengthy or harsh
            7. cross-examination. K.M.'s questioning was a bit more
            8. extensive, although, again, not extremely lengthy or
            9. prolonged. But she was asked questions about her
            10. drinking problem, about having attended residential
            11. treatment for her drinking. She was questioned about
            12. having been arrested the night before she provided her
            13. statement to police, and she was asked to explain what
            14. she meant in her statement when she said that she and
            15. Mr. Lafferty had sex.
            16. Towards the end of the cross-examination, the
            17. presiding judge asked if she wanted a break, which is
            18. consistent with Crown's position that she was getting
            19. upset, and this is further supported by the fact that at
            20. the very end of her evidence, someone makes
            21. reference to needing to give her some Kleenex.
            22. Obviously, Mr. Lafferty was entitled to have a
            23. preliminary hearing. He was entitled to test the Crown's
            24. case. That is often the purpose of a preliminary
            25. hearing, and normally, I would not review a preliminary
            26. hearing transcript or even attempt to gauge the type of
            27. cross-examination that a witness was subjected to. 15
                1. The only reason I did so here was that it was raised
                2. and counsel had slightly different interpretations or
                3. views as to what happened. But as I already said,
                4. testifying about these kinds of personal matters would
                5. be hard on anyone, whether it's at a preliminary hearing
                6. or at a trial. Anyone who has dealt with these types of
                7. cases could well imagine that testifying about these
                8. matters would have been difficult for these girls, who
                9. were 14 and 15 at the time of the preliminary hearings.
                10. But at the same time, this is precisely why
                11. avoiding them having to do the same thing in front of
                12. jury of 12 persons is so significant. So in short, a very
                13. early guilty plea, that avoids testimony completely, is
                14. usually given more weight than one that comes late in
                15. the proceedings, when witnesses have had to testify
                16. once, and lived with the belief, for an extended period
                17. of time, that they would have to testify again. That
                18. being said, any guilty plea, even offered at the 11th
                19. hour, still spares victims and witnesses from the need
                20. to testify, and for that, Mr. Lafferty is entitled
                21. considerable credit.
                22. The next issue is that of whether, in relation to
                23. K.M.'s matter, the sexual contact occurred in the
                24. context of a relationship of genuine affection. *Hajar*
                25. recognized that in certain circumstances, the existence
                26. of a relationship of genuine affection may be a
                27. mitigating factor on sentencing, and in some cases, 16

1 may found to be a very weighty mitigating factor. This

2 is addressed in the majority decision in paragraphs 130 3 and 131.

1. Justice Bielby, in her minority decision, at
2. paragraph 178, identified some of the features of such
3. a relationship:
4. It may be that exploitation will be present in
5. every case of sexual interference, except
6. possibly where the offence occurs in the context
7. of a genuine relationship of mutual respect and
8. affection between the complainant and the
9. accused, when the relationship, if is of some
10. considerable duration and where the age
11. difference between the complainant and the
12. accused is not significantly greater than the five-
13. year close-in-age defence.
14. Justice Bielby then adopts the description of Professor
15. Sonja Grover, in her article, “On Power Differences and
16. Children’s Rights: A Dissonance Interpretation of Rind
17. and Associates, (1988) Study on Child Sexual Abuse
18. (2003) *Ethical Human Science & Services 21.*
19. Professor Grover writes:
20. A relationship of genuine affection is one where
21. a child or adolescent has the opportunity to
22. experience sexual contact in a situation of
23. genuine choice, in the context of an equal power
24. relationship.

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* 1. Defence argued that with respect to K.M., this
  2. exception, if I can call it that, applies, that this was a
  3. situation involving a relationship of genuine affection,
  4. and that this is a mitigating factor. The Crown
  5. disagrees with that proposition. As always, when the
  6. defence relies on a mitigating factor that is disputed, it
  7. falls to defence to establish its existence on a balance
  8. of probability. *Criminal Code,* s. 724(3)(d).
  9. It will often be the case, in these types of cases -
  10. - and by this, I mean in cases where there is ostensible
  11. consent -- that there are some indications of affection
  12. between the parties. *R. v. Nair,* 2017 ABQB, is a good
  13. example of such a situation, where the
  14. Court nonetheless concluded that the relationship was
  15. actually dysfunctional and predatory.
  16. Going back to the factors that were identified by
  17. Justice Bielby, in this case, the relationship with K.M.
  18. went on for a period of three months, which is not very
  19. long. The age difference between her and Mr. Lafferty
  20. was considerable, and nowhere near the close-in-age
  21. exception. The sexual encounters usually took place
  22. when they were both intoxicated. On one occasion, Mr.
  23. Lafferty was violent towards her, and it was during that
  24. same period that he engaged with P.G., offering her
  25. alcohol and having intercourse with her.
  26. In my view, these are not features of a
  27. relationship that is based on mutual respect or one that

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1. involves equal power for both parties. I am not satisfied
2. that the relationship between Mr. Lafferty and K.M. had
3. the fundamental characteristics needed to render it a
4. mitigating factor on sentencing.
5. Turning to aggravating factors, aside from their
6. inherent seriousness, these offences have some
7. aggravating factors, including, first, the age gap
8. between Mr. Lafferty and his victims; second, the fact
9. that he provided alcohol to them, which rendered them
10. more vulnerable; third, the fact that, with K.M., there
11. were numerous incidents; four, the fact that with K.M.,
12. Mr. Lafferty did not always use condoms, thereby
13. increasing the risk of pregnancy or sexually transmitted
14. disease; fifth, the use of violence against K.M. on one
15. of the occasions referred to in the agreed facts.
16. There's also Mr. Lafferty's criminal record, which
17. occurred after these offences. He has already been
18. punished for the breaches, so I do not attach much
19. weight to his criminal record, but his failure to comply
20. with the no-contact order with respect to K.M. shows a
21. certain level of persistence on his part and is entirely
22. consistent with the view that he appeared to have, at
23. least at one point, that there was nothing wrong with his
24. involvement with her.
25. The Crown has argued that the harm suffered by
26. the victims is also an aggravating factor. In my view,
27. the presumption of harm in these cases is very much at

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1. the heart of the underlying rationale for the three-year
2. starting point. This is not unlike the rationale for the
3. four-year starting point for sexual assaults committed
4. by a person who is in a parental position. The
5. presumption in those cases is that in every such case,
6. there is a very real risk, a very real harm to the child, as 7 was noted in *R. v W.B.S.,* (1992) 73 CCC (3d) 530
7. (Alta CA).
8. Since the harm caused by these offences is built
9. into the starting point, I do not think it should be treated
10. as a further aggravating factor, and I find the same with
11. respect to the victims' ages. It is inherently built into the
12. assessment of how serious these matters are, as part
13. of the setting of the starting point.
14. I have already addressed the fact that
15. concurrent sentences are not available here, because
16. that is prohibited by s. 718.3(7)(b). Because
17. consecutive sentences are required, this in turns,
18. engages another provision of the *Code,* s. 718.2(c),
19. that states that when consecutive sentences are
20. imposed, the combined sentences should not be
21. unduly long or harsh. That requirement is rooted in the
22. fundamental sentencing principle of proportionality.
23. The global overall sentence must never exceed the
24. overall culpability of the offender. *R. v. Kawaja,* 2012
25. SCC 69.
26. I expect that the range proposed by defence 20
    1. factored in its position that for the offence involving
    2. K.M., this relationship was one of genuine affection,
    3. and this was mitigating. Having rejected that argument,
    4. I do not find that the global range proposed by defence
    5. would adequately reflect the seriousness of these
    6. offences, the aggravating factors in Mr. Lafferty's
    7. overall culpability.
    8. I'm going to deal with the ancillary orders first.
    9. The Crown has sought a number of them.
    10. First, with respect to the requirement to comply
    11. with the *Sex Offender Information Registration Act*,
    12. there is a constitutional challenge on the operation of
    13. those provisions, so I leave it aside for today.
    14. These are primary designated offences, so a
    15. DNA order is mandatory, and that order will issue.
    16. The firearms prohibition order, pursuant to s.
    17. 109 of the *Code,* is also mandatory, and that order will
    18. issue. It will be in effect as of today, and it will expire
    19. 10 years after Mr. Lafferty's release.
    20. The Crown seeks an order prohibiting Mr.
    21. Lafferty from having contact with either victim during
    22. the custodial portion of his sentence, pursuant to s.
    23. 743.21 of the *Code.* That order will issue. And it
    24. should refer to the victims by name, obviously, for
    25. clarity's sake.
    26. The Crown seeks an order pursuant to s. 161 of
    27. the *Criminal Code,* more specifically pursuant to 21
        1. paragraphs (a), (b), and (c). This has to do with
        2. preventing someone from being in certain places,
        3. where they might come into contact with children. The
        4. Crown seeks this order to be in place for a duration of
        5. 20 years. I have carefully considered whether an order
        6. under s. 161 should issue in this case, and if so, what
        7. its duration should be.
        8. The law is clear that the purpose of a s. 161
        9. order is the protection of children from sexual violence. 10 *R. v. K.R.J*., 2016 SCC 31, *R. v. L.C*., 2018 ONCA 311.
27. It is a discretionary order. It is also clear that such an
28. order is part of the sentence, part of the punishment for
29. the offence. Because of the protective purpose of the
30. order, a court, to make it, has to be of the view that
31. there is a serious risk to the safety of the child or
32. children under 16, *R. v. Doll,* 2015 NWTSC 1.
33. The factors to be considered in deciding whether
34. a s. 161 order should be made overlap in many ways
35. with the factors that affect sentencing generally, things
36. like the circumstances of the offence, its severity, its
37. duration, the number of victims, the impact of the
38. victims, the criminal record -- especially if there is a
39. related one -- and anything, really, that goes to the
40. issue of risk of re-offending, *R. v. R.K.A*., 2006 ABCA
41. 82*.* As the Alberta Court of Appeal said in *R.K.A.,* "The
42. danger to children is key."
43. Here, the offence is more serious and there are 22
    1. two victims, and with K.M., they were repeated
    2. offences. They were not as young as the victims in
    3. some of the cases filed by counsel, but they were
    4. vulnerable. On the other hand, Mr. Lafferty does not
    5. have a criminal record for similar offenses.
    6. The breaches of the no-contact order with K.M.
    7. is a concern. So is the lack of insight and empathy,
    8. initially, for his victims, as was shown when he was
    9. interviewed for the preparation of the pre-sentence
    10. report.
    11. But I do take into account the passage of time,
    12. and the fact that Mr. Lafferty's view of the matter
    13. appears to have changed. As I've already said, and I
    14. cannot say it enough, I am hopeful he has truly
    15. acquired insight now into these matters. It did seem to
    16. be a while before he did so, but I truly hope he now
    17. has.
    18. It's important not to overlook that there are also
    19. positive things that emerge from the pre-sentence
    20. report, including the fact, for example, that there was a
    21. time when Mr. Lafferty was involved in coaching youth
    22. when he was living with Mr. McKay. There is no
    23. indication that there was anything inappropriate that
    24. happened during this time.
    25. On balance, I agree that a s. 161 order is
    26. warranted, to limit the possibility of Mr. Lafferty being
    27. tempted to revert to this type of conduct in the future. It

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1. will also be helpful for the protection of teenage girls in
2. his community. It will also be consistent -- although
3. that's not the primary purpose -- with his own
4. rehabilitation, because it will eliminate opportunities for
5. him to engage with persons he should not be engaging
6. in. All that being said, I do not think the order needs to
7. be for as long as what the Crown seeks.
8. For a first offender, these proceedings and the
9. significant amount of time Mr. Lafferty will have spent in
10. custody as a result, will hopefully have a powerful
11. deterrent effect on him. There's no evidence before me
12. suggesting that he suffers from a sexual disorder that
13. could be at the root of this conduct. That type of
14. evidence is not required for a s. 161 order to be made,
15. of course, but if there was evidence of such a thing, it
16. would show a much-increased risk and perhaps justify
17. a longer order.
18. So I have decided that there should be a s. 161
19. order pursuant to Section 161(2). It will commence
20. when Mr. Lafferty is released from custody, and I will
21. have it be in force for a period of three years. It will
22. include only the prohibitions set out at paragraphs (a),
23. (b), and (c) of Section 161. I will include an exception,
24. in that the order will not apply to Mr. Lafferty's own
25. children, or the children of anyone he might be in a
26. common-law relationship with. I also want to make it
27. clear that it is possible for the Crown or for Mr. Lafferty

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1. to apply for a variation of this order if circumstances
2. change.
3. Concretely, this means, for example, that Mr.
4. Lafferty, after his release, wants to become involved in
5. some of the positive activities he's been involved with in
6. the past, such as coaching youth, he could apply for a
7. variation of this order to permit him to do so. It would
8. be very unfortunate to have this order interfere with
9. positive pro-social activities that could assist him and
10. be a part of him turning his life around, be rehabilitated,
11. and be a productive member of whichever community
12. he chooses to live in.
13. Turning to the sentence itself, I have concluded,
14. having adopted the three-year starting point set out in
15. *Hajar,* that a sentence in the range of two and a half to
16. three years would be appropriate for the sexual assault
17. on K.M., and a sentence in the range of two to two and
18. a half years would be justified for the sexual assault on
19. P.G. But because the sentences have to be
20. consecutive, these would result in the imposition of a
21. total sentence between four and a half to five and a half
22. years.
23. That would be more than the global sentence
24. that the Crown seeks, and quite apart from that, it
25. would also, in my view, result in an excessive sentence.
26. I have adjusted these numbers to arrive at a global
27. sentence of three and a half years. In my view, given

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1. the aggravating factors in this case, which I will not
2. repeat, the global sentence of three and a half years is
3. as restrained a sentence as the court can impose.
4. Can you stand please, Mr. Lafferty? Mr.
5. Lafferty, if you did not have any time on remand, I
6. would have imposed the sentences as follow: two years
7. for the sexual assault on K.M., and one-and-a-half-year
8. consecutive on the sexual assault on P.G. For the 487
9. days you've spent in custody already, I give you credit
10. for two years, so there will be a further jail term of one
11. and a half years. You can sit down.
12. Now, by my account, counsel, the remand time
13. effectively covers the sentence imposed on the first
14. count, and that leaves the count of one and a half
15. years. Is there anything from the Crown's point of view
16. that I've overlooked for this part of things?
17. M. CHERTKOW: No.
18. THE COURT: Anything from defence?
19. C. DAVISON: No, thank you. 20

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# 23 (PROCEEDINGS ADJOURNED)

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# CERTIFICATE OF TRANSCRIPT

1. Neesons, the undersigned, hereby certify that the foregoing
2. pages are a complete and accurate transcript of the
3. proceedings transcribed from the audio recording to the best
4. of our skill and ability. Judicial amendments have been
5. applied to this transcript. 7

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9 Dated at the City of Toronto, in the Province of Ontario, this

10 25th day of September, 2019. 11

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1. Kim Neeson
2. Principal 16

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