

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

– and –

R.A.

**WRITTEN REASONS FOR DECISION
of the
HONOURABLE JUDGE ROBERT GORIN**

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person. Some details may have been edited to ensure that the victim may not be identified.

Heard at: Yellowknife, Northwest Territories
Date of Decision: May 8, 2019
Counsel for the Crown: Jay Potter & Jeffrey Major-Hansford
Defence Counsel: Paul Falvo

[Ss. 12 & 1 *Canadian Charter of Rights and Freedoms*;
s. 52 *Constitution Act, 1982*; s. 152(b) *Criminal Code*]

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INTRODUCTION

[1] R.A. has pleaded guilty to inviting a person under the age of 16 years to engage in sexual touching contrary to s. 152 of the *Criminal Code*.

[2] The Crown proceeded summarily. Under the circumstances, subsection (b) of s.152 provides for a mandatory minimum punishment (“MMP”) of 90 days imprisonment. The Crown asks that a sentence of 4 months imprisonment be imposed along with a probation order.

[3] R.A. argues that the MMP constitutes cruel and unusual punishment and therefore violates s. 12 of the *Canadian Charter of Rights and Freedoms*. She asks that I find it to be of no force and effect and that I impose a conditional sentence.

[4] The Crown opposes the application and, among other things, states that as a statutory court I am not required to apply the same legal test that would be required in a superior court. Specifically, the Crown suggests that if I find that the MMP would not be grossly disproportionate in the case of R.A., I need not go on to consider whether it would be grossly disproportionate in reasonable hypothetical scenarios.

[5] I have concluded:

1) In determining, whether an MMP is cruel and unusual, the same legal test applies in statutory courts as in superior courts. If the court determines that the MMP is not grossly disproportionate in the case of the accused, it must go on to consider whether it would be grossly disproportionate in the case of reasonable hypotheticals;

2) The MMP provided for in s. 152(b) of the Code, while not grossly disproportionate in the case of R.A., would be grossly disproportionate in the case of reasonable hypotheticals. Consequently, it violates s. 12 of the Charter;

3) The MMP is not saved by s. 1 of the Charter. That being the case, it is of no force and effect in the case before me; and

4) Notwithstanding the invalidity of s. 152(b), in the case of R.A., a short term of incarceration with probation is the most appropriate sentence. Under all of the circumstances, I am imposing a jail term of 90 days to be followed by 1 year of probation.

[6] My reasons follow.

BACKGROUND

[7] The charge against R.A. states that she:

Between January 14, 2018 and January 25, 2018 at or near the Hamlet of Ulukhaktok in the Northwest Territories did for a sexual purpose invite [N.C.] a person under the age of fourteen [sic] years to touch directly with a part of her body to wit her mouth the body of [R.A.] contrary to section 152 of the Criminal Code.

[8] The relevant portions of s. 152 state:

152 Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,

[. . .]

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

[9] In this case, the Crown elected to proceed summarily and R.A. pleaded guilty on December 5, of 2018.

[10] An agreed statement of facts was submitted on May 8th and is set out below:

1. [N.C.] was born April 16, 2005.
2. [R.A.] was born on March 7, 1997.
3. Beginning in January, 2018, [N.C.] and [R.A.] began exchanging text messages with each other, as well as messages through the Facebook Messenger platform.
4. On January 21, 2018, [N.C.] contacted [R.A.] over Facebook Messenger and they began to exchange messages with each other. During this exchange, [R.A.] sent the following messages to [N.C.]; “But I wan your pussy”, “Well let me fuck you again”: “Damn let me see how wet u could get after finguring and licking you for hours [numerous emojis omitted]”; and “you gon ride me too ah my

- sexy horny girlfriend”. Each of these texts references sexual acts that [R.A.] is inviting [N.C.] to engage in.*
5. *On January 24, 2018, [R.A.] and [N.C.] were sending text messages back and forth to discuss a plan for the two of them to meet up for sex at the victim’s residence. The conversation was initiated by the victim, but [R.A.] was in agreement with the intended plan. The arranged meeting was ultimately called off by [R.A.] as a result of some discomfort she was experiencing in her leg. Some of the texts sent by [R.A.] during this exchange include: “But I wan your pussy [emojis omitted]”; “Thinking a lot about ur pussy thu lol I wan come and do a lot of shit to u [emojis omitted]” and “some other time? Ik, im sorry in really wanted to but my stupid leg lol”.*
 6. *RCMP members in Ulukhaktok received a complaint on January 24th of the communications between [R.A.] and [N.C.].*
 7. *An RCMP officer working in Ulukhaktok arrested [R.A.] on January 24th of the communications between [R.A.] and [N.C.].*
 8. *An RCMP officer working in Ulukhaktok arrested [R.A.] on January 25, 2018. Following her being informed of her Charter rights and speaking to a lawyer, she gave a warned statement wherein she admitted to communicating with [N.C.]. And asking her to have sexual relations. She also admitted asking [N.C.] for sexually explicit pictures.*
 9. *[R.A.] knew that she was communicating with [N.C.], and that [N.C.] was under 16 years old.*

ANALYSIS

1) Determining whether an MMP is cruel and unusual.

[11] The applicable jurisprudence from the Supreme Court of Canada states that and MMP will not offend s. 12 simply because it is disproportionately harsh. In order to be “cruel and unusual”, the MMP must be “grossly disproportionate”. It must be so excessive as to outrage standards of decency: *R. v. Lloyd*, 2016 SCC 13, para. 24.

[12] In other words, the question is not whether the MMP would result in a sentence that is unfit. The sentence must be disproportionate to the extent that an informed public would find the punishment intolerable or abhorrent: *Lloyd*, (supra), para. 24.

[13] Determining whether an MMP constitutes cruel and unusual punishment is a two-step process. The first step requires the court to determine whether or not the MMP would result in a grossly disproportionate sentence in the case of the offence and the accused before it.

[14] To fulfill this first step, the court must determine what would constitute the range of fit and appropriate sentences in the case before the court having regard to the sentencing goals and principles set out in the *Criminal Code*. The court must then determine whether the MMP is grossly disproportionate to that range of fit and proportionate sentences: *Nur*, (supra), para. 45; and *Lloyd*, (supra), para. 23.

[15] If the MMP is found to be grossly disproportionate in the case before the court, the MMP will violate s. 12 and unless justified under s. 1 of the Charter, is invalid.

[16] However, in cases where the MMP is not found to be grossly disproportionate in the case before the court, the court must ask itself a second question: whether it is reasonably foreseeable that it would be grossly disproportionate in the case of other offenders: *Nur*, paras. 58 and 65. In other words, the court must determine whether or not s. 12 would be violated in the case of reasonable hypotheticals.

[17] The hypotheticals must be truly reasonable. They must not be “farfetched or marginally imaginable cases” or “remote or extreme examples: *R v Goltz*, 1991 CanLII 51 (SCC), [1991] 3 SCR 485, per Gonthier J, at pp. 506 and 515 [SCR]. They cannot be fanciful or remote: *Nur*, para. 62. They must be based on judicial experience and common sense.

[18] The question of whether the MMP is grossly disproportionate in the case of reasonable hypotheticals is simply asking whether it is reasonably foreseeable that

the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples' situations, resulting in a violation of s. 12: *Nur*, at para 57.

[19] Practically speaking, where an offence has a broader range in terms of the potential conduct it captures, there will be a broader range of reasonable hypotheticals. Consequently in such cases an MMP may be more vulnerable to a challenge pursuant to s. 12: *Nur*, para. 82; *Lloyd* paras. 27 – 33.

[20] In determining whether an MMP is grossly disproportionate either in the case of the accused or in the case of reasonable hypotheticals, the court must consider: the gravity of the offence, the circumstances of the offender and the offence; the actual effect of the punishment on the offender; and penological goals and sentencing principles such as the existence of valid alternatives to the MMP and parity: *R. v. Morrissey*, 2000 SCC 39, paras. 35-49.

2) Does the approach to determining whether an MMP violates s. 12 of the Charter differ between superior courts and statutory courts?

[21] The Crown submits that once a provincial/territorial court determines that an MMP would not be disproportionate in the case of the offender before the court, it need not go on to the second step of considering reasonable hypotheticals. In support of its position the Crown cites the cases of *R. v. Lloyd*, (supra) and *R. v. Mohamed*, 2016 ONCJ 492.

[22] S. 52(1) of the *Constitution Act, 1982* contains what is often referred to as “the supremacy clause”. It states:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[23] It is uncontroversial that while provincial/territorial court judges cannot declare a statute to be unconstitutional and of no general force in their territorial jurisdiction, they have the power to determine its constitutionality in the case

before them and to not apply it where they determine it to be invalid. However, a statutory court *may* decline to make such a determination in cases where the issue of a statute's constitutionality is moot. This includes cases where the accused is arguing that an applicable MMP violates s. 12 of the Charter. In that regard, McLachlan C.J. on behalf of the majority in *Lloyd* stated 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 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.

[24] The Crown's position essentially relies on the approach set out in *Mohamed*, (supra) in the following passage:

[4] The leading authority dealing with this Charter application is found in the recent decision of the Supreme Court of Canada in *R. v. Lloyd* 2016 SCC 13 (CanLII). In that case the Court made it clear that a provincial court judge cannot make a formal declaration of invalidity of sentencing legislation. The approach to be taken by a provincial court judge is different than that which might be taken by a court of inherent jurisdiction, such as the Superior Court. The Supreme Court stated, at paragraphs 15-18,

[15]. ... Provincial court judges are not empowered to make formal declarations that a law is of no force or effect under s. 52(1) of the Constitution Act, 1982 ... However, provincial court judges do have the power to determine the constitutionality of a law where it is properly before them.

[16]. ... Provincial court judges must have the power to determine the constitutional validity of mandatory minimum provisions when the issue arises in a case they are hearing. This power flows directly from their statutory power to decide the cases before them. ...

[18]. ... 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 in the case in issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide.

[5] Following the direction of the Court in *R v. Lloyd*, this court must start the Charter analysis by determining, firstly, “what constitutes a proportionate sentence for the offence”, and secondly, whether the mandatory minimum would require the imposition of “a sentence that is grossly disproportionate to the offence and its circumstances ...” If I determine that imposing the mandatory minimum sentence would not be grossly disproportionate for Mr. Mohamed, judicial economy would suggest that, at this level of court, the enquiry should end at that point. If I find the sentence to be grossly disproportionate for Mr. Mohamed that would equate to a finding that the law violates s. 12 of the Charter and the mandatory minimum would not apply to Mr. Mohamed. In other words, the analysis as conducted by a provincial court judge focuses very much on the appropriate sentence for the offender, rather than the general applicability of the law to hypothetical individuals.

[6] In considering the standard for gross disproportionality I am mindful of the statement of the Chief Justice, in paragraph 24 of *R v Lloyd*, that the Supreme Court “has established a high bar for finding that a sentence represents a cruel and unusual punishment. To be ‘grossly disproportionate’ a sentence must be more than merely excessive. It must be ‘so excessive as to outrage standards of decency’ and ‘abhorrent or intolerable’ to society ...”

[25] With respect, I am unable to agree with the interpretation of *Lloyd* as set out in the foregoing passage in *Mohamed*. In my view it conflates the test for mootness set out in *Lloyd* with the test for determining the constitutionality of an MMP. It also conflates unfitness with gross disproportionality.

[26] Part of the confusion in *Mohamed* may arise from its incomplete reference to paragraph 18 of *Lloyd*. The crucial missing portion of that paragraph states:

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 its constitutionality.*

[Emphasis Mine]

[27] It is also important to note that in *Lloyd* at paragraph 23, McLachlin C.J. continued by stating in no uncertain terms the procedure to be followed in determining whether an MMP violates s. 12:

[23] A challenge to a mandatory minimum sentencing provision under s. 12 of the *Charter* involves two steps: *Nur*, at para. 46. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. The court need not fix the sentence or sentencing range at a specific point, particularly for a reasonable hypothetical case framed at a high level of generality. But the court should consider, even implicitly, the rough scale of the appropriate sentence. Second, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances: *Smith*, at p. 1073; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 498; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at paras. 26-29; *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 337-38. In the past, this Court has referred to proportionality as the relationship between the sentence to be imposed and the sentence that is fit and proportionate: see e.g. *Nur*, at para. 46; *Smith*, at pp. 1072-73. The question, put simply, is this: In view of the fit and proportionate sentence, is the mandatory minimum sentence grossly disproportionate to the offence and its circumstances? If so, the provision violates s. 12.

[28] Following the complete approach set out in *Lloyd*, it will only be in cases where the floor of the range of fit sentences that apply to the case before the court falls significantly below the MMP that a provincial court need not consider whether or not the MMP is cruel and unusual. It need not do so, since it would not make a difference in the case before it. Under such circumstances - and because a provincial court cannot make a declaration of unconstitutionality that applies outside of the case before it - the question is moot.

[29] Nevertheless, if a provincial court determines the floor of fit sentences falls below the MMP it must go on to consider whether or not the sentence is cruel and unusual. It is at that point that the question of gross disproportionality must be examined – both in the case of the accused before the court, and in the case of reasonable hypotheticals. If the court finds that the MMP is grossly disproportionate in either scenario, then subject to s. 1 of the Charter applying, the MMP is unconstitutional and the court will not be bound by the MMP.

[30] I note as well that the approach argued in *Mohamed* would apply in all summary conviction proceedings. In my respectful view, it would be untenable to have a different test for the constitutionality of an MMP dependent on the Crown's election – or for that matter the accused's election as to mode of trial where applicable.

[31] The *Mohamed* decision has been cited in a total of three subsequent decisions. Coincidentally, two of those decisions are from the Supreme Court of the Northwest Territories. Only one of the three decisions discusses the propriety of the approach set out in *Mohamed*. In *R. v. Kakfwi*, 2018 NWTSC 13, the Supreme Court was sitting as a sentencing court and the question of the approach to be followed in a statutory court was not squarely before it. It appears that *Mohamed* was simply being offered to the court as an example of a case where the applicable MMP in s. 244.2 of the Code was upheld. Nonetheless Charbonneau C.J. noted:

[40] The sentencing judge concluded that the mandatory minimum sentence was not grossly disproportionate under the circumstances. With respect to consideration of reasonable hypotheticals, the sentencing judge said:

Given that the mandatory minimum sentence would not be disproportionate for Mr. Mohamed, no purpose would be served in proceeding to the stage of examining hypothetical situations.

R v Mohamed, para 16.

[41] *This approach seems difficult to reconcile with the legal framework adopted by the Supreme Court of Canada, set out above at Paragraphs 21 to 25 [of this judgment]. In any event, the net result is that reasonable hypotheticals were not considered in that case.*

(Emphasis Mine)

[32] In summary, after having considered the positions articulated by counsel and the applicable jurisprudence, I have concluded that the steps to be followed in determining whether an MMP constitutes cruel and unusual punishment are the same in both superior and statutory courts.

[33] In either case, the analysis of the constitutionality of the sentencing provision requires two inquiries:

- 1) Whether the MMP would be grossly disproportionate in the case of the offender before the court; and if not
- 2) Whether the MMP would be grossly disproportionate in reasonably foreseeable cases;

[34] If the answer in either case is “yes”, the MMP violates s. 12.

[35] Certainly a statutory court may make a preliminary finding that determining the issue could not make a difference in the case before it and accordingly elect not to determine the MMP’s constitutionality. However, the question of mootness is distinct from the issue of the MMP’s constitutional validity.

3) Is the question of whether the MMP set out s. 152(b) of the *Criminal Code* violates s. 12 of the Charter, moot in the present case?

[36] I have concluded that the constitutional question raised in this case is not moot in the present case. Crown counsel argues that a jail term of 4 months is appropriate. Counsel for R.A. argues that a conditional sentence of imprisonment served under terms of house arrest would be appropriate. He does not specify the length of the conditional sentence that would be appropriate.

[37] As stated, in *Lloyd* the former Chief Justice stated:

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 its constitutionality.

(Emphasis Mine)

[38] Pursuant to s. 742.1(b) of the Code, a conditional sentence of imprisonment is not possible in cases where an MMP requires imprisonment.

[39] I am unable to find that a conditional sentence would not necessarily be within the range of fit sentences were it not for the MMP of 90 days imprisonment that applies in this case. When the former Chief Justice spoke of a “sentencing range”, I take her to have meant a range of sentences which during the ordinary course with no MMP would ultimately not be found to be unfit. The range of reasonable sentences that can ordinarily be imposed by a court is broad. As stated by Iacobucci J. for the majority in *R. v. Shropshire*, [1995] 4 SCR 227:

[46] The question, then, is whether a consideration of the “fitness” of a sentence incorporates the very interventionist appellate review propounded by Lambert J.A. With respect, I find that it does not. An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[47] I would adopt the approach taken by the Nova Scotia Court of Appeal in the cases of *R. v. Pepin* (1990), 1990 CanLII 2481 (NS CA), 98 N.S.R. (2d) 238, and *R. v. Muise* (1994), 1994 CanLII 4074 (NS CA), 94 C.C.C. (3d) 119. In *Pepin*, at p. 251, it was held that:

. . . in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or [if] *the sentence is clearly or manifestly excessive*.

[Emphasis Mine.]

[40] As also pointed out by the Supreme Court of Canada in *R. v. Proulx*, [2000] 1 S.C.R. 61, a conditional sentences can provide significant denunciation and deterrence. As also noted by the court at paragraph 102:

[. . .] Incarceration will usually provide more denunciation than a conditional sentence, as a conditional sentence is generally a more lenient sentence than a jail term of equivalent duration. That said, a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed *and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances.*

[Emphasis Mine]

[41] In this case, the Crown suggests that a short sharp term of 4 months of imprisonment is appropriate. Given the substantial deference that is typically accorded to sentencing judges, it is difficult for me to conclude that if a conditional sentence of a longer duration with onerous conditions were imposed, the sentence would be determined to be unfit to address sentencing goals of denunciation and deterrence.

[42] Accordingly, I find that the question of the constitutionality of the applicable MMP is not moot in the present case.

4) Is the MMP provided for in s 152(b) grossly disproportionate in the case of R.A.?

[43] I find that in the case of R.A., the applicable MMP of 90 days imprisonment would not be grossly disproportionate for a number of reasons.

[44] I find the facts of this case to be serious. The victim, N.C., at 12 years of age was very young at the time that R.A. invited her to have sexual contact. The age difference between R.A., who was 20 years old at the time, and the victim was more than 8 years. R.A. made the invitations repeatedly over a number of days.

[45] The invitations were for sexual contact of a substantially intrusive nature. She said she wanted to “fuck” the victim and have the victim “ride” her. There were suggestions that R.A. would have oral sex with the victim and also that she fondle her vagina for extended periods of time.

[46] R.A. comes before the court with a prior criminal record. On May 19 of 2016 she was convicted of offences of common assault and assault causing bodily harm, both of which occurred on March 30th of that same year. R.A. was sentenced on both of these prior offences on May 19, 2016. She received a suspended sentence with a 2-year probation order. In September of 2017 she was convicted of breaching that probation order on July 10, 2017.

[47] The record is related in that it contains two convictions for crimes against the person. The conviction for breaching her probation order is relevant to the viability of the conditional sentence requested by R.A. Additionally in that regard, the same probation order still had more than 3 months left to run at the time she committed the offence before me.

[48] Although in these proceedings she has not been convicted of breaching the probation order, I must consider the aggravating feature that on the date of the present offence R.A. was subject to a probation order and that by committing the within offence she breached the statutory condition that she keep the peace and be of good behaviour. Furthermore, she did so less than 4 months after having already been convicted of and sentenced for breaching the same probation order.

[49] In addition to R.A.'s criminal antecedents, I must also consider her personal circumstances. She is Inuit and lives in Holman, a community located on Victoria Island 925 air kilometres north of Yellowknife where the overwhelming majority of residents are Inuvialuit or Inuit. She has traditional hunting and fishing skills. She comprehends Inuinnaqtun quite well although she can speak it to only a limited extent. She grew up in an environment in which both of her parents consumed alcohol heavily. She often witnessed physical violence between them. Her father has been completely sober for over 5 years while her mother continues to struggle with her alcohol consumption. She has attempted suicide on a number of occasions in the past and continues to experience suicidal ideation. From the Pre-Sentence Report, it appears that she is a victim of a sexual assault that occurred during or before 2014.

[50] Due in part to being bullied, her attendance at school was sporadic until she quit at grade 10. Before leaving, her reading and mathematical skills were tested at

a grade 6/7 level, and her language skills at a grade 5/6 level. More recently, she has begun adult education and is working on mathematics and English. She is reported to have operated at a level that is comparable to grade four to six of primary school and has not been progressing for over a year. She has never been employed.

[51] She has had her own difficulties with substance abuse in the past. Her father indicates that she would drink to the point of passing out and would become falling down drunk for days at a time. However, it appears that this behaviour has improved to the extent that her father has not witnessed it for over a year.

[52] A psychiatric discharge summary from late 2015 indicates that at the time of being examined R.A. suffered from depressive disorder, alcohol use disorder, marijuana use disorder and a serious heart rhythm disorder that can cause fainting, seizures, and death. She has been prescribed anti-depressant medication in the past.

[53] The impression of the author of the summary was that “[R.A.] is an 18 year old girl who seems much younger than stated age, quite childish, possible/likely intellectually impaired.” However, the Pre-Sentence Report does not refer to any cognitive testing and it is very difficult for me to conclude that she is actually cognitively impaired based on the information that I have before me.

[54] Nonetheless, the Pre-Sentence Report indicates substantial *Gladue* factors along with other personal circumstances that attenuate R.A.’s moral culpability. She lives in a traditional indigenous community, and has traditional skills that show she is strongly connected to her culture. That said, the facts of the offence before me are very serious and the criminal record of R.A. is substantially aggravating. While after taking into account her personal circumstances and indigenous status, I am inclined to impose a sentence somewhat less severe than the 4 months of imprisonment requested by the Crown, I find that by no means is the MMP of 90 days imprisonment grossly disproportionate in this case.

5) Is the MMP provided for in s. 152(b) grossly disproportionate in the case of reasonable hypotheticals?

[55] As stated, if an MMP is grossly disproportionate in the case of reasonable hypotheticals, it will violate s.12. Simply being unlikely is not enough to render a hypothetical unreasonable. For that to occur, the hypothetical must be truly remote or farfetched. In *Nur* the Supreme Court stated:

[68] *The reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law.* Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are “remote” or “far-fetched” are excluded: *Goltz*, at p. 515. *Contrary to what the Attorney General of Ontario suggests there is a difference between what is foreseeable although “unlikely to arise” and what is “remote [and] far-fetched”*: A.F. (*Nur*), at para. 66. Moreover, adoption of the likelihood standard would constitute a new and radically narrower approach to constitutional review of legislation than that consistently adhered to *since Big M*. [*R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295]. *The Court has never asked itself whether a projected application of an impugned law is common or “likely” in deciding whether a law violates a provision of the Charter. To set the threshold for constitutional review at common or likely instances would be to allow bad laws to stay on the books.*

[Emphasis Mine]

[56] Unfortunately, there appears to be little jurisprudence dealing directly with the 90-day minimum jail term prescribed in s. 152(b). While it does not deal with s. 152(b), I find the case of *R. v. Drumonde*, 2019 ONCS 1005 to be particularly instructive. In *Drumonde*, Pringle J. of the Ontario Superior Court of Justice was sitting as a summary conviction appeal court. The constitutionality of s. 151(b) of the Code, which provides for an MMP of 90 days imprisonment in cases of sexual touching of persons less than 16 years of age, was at issue. S. 151(b) provides:

151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
[. . .]

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

[57] In *Drumonde*, the trial judge had found that the 90-day minimum jail term was not grossly disproportionate in the case of the accused, but held that it was in the case of reasonably foreseeable hypotheticals. Pringle J. Upheld the trial judge's decision stating:

(b) *The trial Judge's Hypotheticals*

[50] I agree with the trial judge that a 90-day prison sentence for an unwanted kiss or attempted kiss by an 18-year old on a 15-year-old would be grossly disproportionate. I do not draw this conclusion because I think that such conduct is not serious. Despite the suggestion that the Crown would not prosecute such a case, in my view any unwanted touching of a sexual nature is serious. Whether it deserves a sentence of imprisonment is another matter. In my view, it does not.

[51] The biggest concern with the MMS, however, is that it fails to take into account the personal characteristics of the offender. The trial judge considered two types of characteristics that could make a sentence that is otherwise appropriate grossly disproportionate: Indigenous offenders and those with mental illnesses or disabilities.

(c) *Indigenous Offenders*

[52] It is a sad reality that Indigenous people are drastically overrepresented in Canadian prison. This is a problem that the courts must play a role in ameliorating. To do so, judges sentencing Indigenous offenders must take into account the unique systemic or background factors that have played a part in bringing the particular offender before the court. Courts must also recognize that different procedures and sanctions may be appropriate for an offender because of his or her Indigenous heritage: *Ipeelee*, at paras. 58-59; *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, at paras. 58-74.

[53] The "one size fits all" approach of a MMS can make it difficult, if not impossible to undertake the individualized approach to sentencing that *Gladue* and *Ipeelee* require. This was recognized by the Truth and Reconciliation Commission in its final report, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at pp. 173-174:

One of the most dramatic examples of the trend towards mandatory minimum sentence is the *Safe Streets and Communities Act* (Bill C-10), which came into force in 2012. The Act specifies minimum sentences that judges must impose for certain crimes. As a result of the new legislation, certain offences are no longer eligible for a conditional sentence.

Bill C-10 and other similar *Criminal Code* amendments have undermined the 1996 reforms that required judges to consider all reasonable alternatives to imprisonment, with particular attention to the circumstances of Aboriginal offenders. The Commission believes that the recent introduction of mandatory minimum sentences and restrictions on conditional sentences will increase Aboriginal overrepresentation in prison. Such developments are preventing judges from implementing community sanctions even when they are consistent with the safety of the community and even when they have a much greater potential than imprisonment to respond to the intergenerational legacy of residential schools that often results in offences by Aboriginal persons.

See also *Boudreault*, at para. 83; *R. v. Itturiligaq*, 1018 NUCJ 31, at paras. 55-65; *R. v. Sharma*, 2018 ONSC 1141 (CanLII), 44 C.R. (7th) 341, at paras. 56-69, 101-110.

(d) *Offenders With Mental Illnesses or Disabilities*

[54] A not infrequent challenge faced by sentencing judges is fashioning a fit sentence for an offender whose moral culpability is diminished because he or she suffers from a mental illness or disability. How a MMS can interfere in fashioning a fit sentence in such circumstances is illustrated by the facts in *Swaby*. In that case, the accused was in possession of hundreds of images of child pornography, including some depicting penetrative sexual activity between adults and very young children. He possessed it for his own sexual gratification. However, he had a significant developmental disability with an IQ of between 49 and 59, which put him in the 0.01th percentile, and also likely suffered from some form of schizoaffective disorder and major depressive disorder. It was the opinion of two psychologists who assessed him that he would not be able to tolerate incarceration and that it would be very detrimental to him.

[55] Both the trial judge and the summary conviction appeal court judge in *Swaby* concluded that the MMS would be grossly disproportionate in the circumstances. In dismissing a further Crown appeal, Bennett J.A. stated (at para. 87):

Judge Galati properly concluded that a carceral sentence would be grossly disproportionate to the CSO that he ultimately imposed on Mr. Swaby. Although

Mr. Swaby's offending was extremely serious, it was ameliorated by his personal circumstances. In his unusual circumstances, I agree with Galati P.C.J. and Marchand J. that the mandatory minimum sentence is grossly disproportionate, and that sending Mr. Swaby to prison, even to serve an intermittent sentence, would outrage the standards of decency of most informed Canadians.

In my view, the same conclusion would be reached if Mr. Swaby gave an unwanted kiss to a 15-year-old.

[58] Beginning at paragraph 56 of her judgment she also provided a thorough review of the jurisprudence relating to the constitutionality of the 90 day minimum provided for in s. 151(b), stating:

(i) *Successful Section 12 Challenges*

[56] In *R. v. J.G.*, 2017 ONCJ 881 (CanLII), on which the trial judge relied, Thomas J. concluded that the 90-day MMS would be grossly disproportionate if imposed on the offender before him in circumstances where the conduct at issue would have been legal if the offender had been 35 days younger. He also considered a slight variation on the facts of the case (at para. 73):

If for example by way of a variation on the facts of this case, one could easily imagine a much less intrusive scenario where K.V.'s parents had arrived home unexpectedly and observed their daughter and the defendant kissing and engaged in some mutual over the clothing petting. That conduct would equally constitute a sexual interference, invitation to sexual touching and sexual assault. They are upset and contact the police who charge him with offences under sections 151, 152 and 271. Section 150.1 would vitiate any consent, and J.G. would be facing a minimum 90 day jail sentence, (or six months under s. 271) which would surely be grossly disproportionate to his moral culpability in the circumstances of their relationship and respective ages.

[57] The 90-day MMS was also held to violate s. 12 in *R. v. Okoro*, [2018] O.J. No. 2102 (C.J.). In that case, after considering a number of hypothetical situations involving vulnerable offenders and sexual contact such as a kiss, Bacchus J. concluded (at para. 59):

The mandatory minimum sentence regime does not discriminate with respect to the age of the offender or the nature of the touching and it does not allow the court to consider the plethora of mitigating circumstances which may render a 90 day jail sentence crushing and grossly disproportionate.

[58] In *R. c. Gagnon*, 2018 QCCQ 9569 (CanLII), the court considered hypothetical situations involving minor, momentary touching based on reported cases, including *R. v. Hilan*, 2015 ONCA 455 (CanLII), *R. v. Burton*, 2012 ONSC 5920 (CanLII) and *R. c. Akplogan*, 2018 QCCQ 3024 (CanLII), some of which had been considered by the Québec Court of Appeal in *Caron Barrette* in concluding that the one-year minimum in s. 151(a) infringed s. 12. Based on these, Marleau J.C.Q. concluded that the 90-minute minimum in s. 151(b) was also unconstitutional (at paras. 93-11).

(ii) *Unsuccessful Section 12 Challenges*

[59] The opposite conclusion was reached in *R. v. C.F.*, 2016 ONCJ 302 (CanLII), at pp. 23-24:

The defendant was a few weeks past his 18th birthday on the offence date. The actions he performed constituted touching over top of clothing and mimicking sexual activity as described in my judgment at trial. Having the complainant touch his penis is a factual element that takes this case away from perhaps the most sympathetic hypothetical. Further, the remorse associated with a guilty plea might have made the analysis more stark. But certainly this is the sort of offender and case that meets the criteria of a reasonable hypothetical, as submitted by the applicant.

The crux of the matter is that reasonably hypothetical adult offenders who commit sexual offences against children with specific intent contrary to s. 151 of the Criminal Code often receive some period of imprisonment as part of their sentence.

I agree with the Crown submission that if there is no s. 12 breach on the particularized inquiry, given the make-up of the defendant before the court, there should not be a hypothetical that grounds a breach. I have found that the mandatory minimum sentence is not grossly disproportionate in the particularized inquiry set out in this judgment. As such, given the characteristics of the particular defendant before the court, it is unlikely that any reasonable hypothetical offender could ground a s. 12 breach: See *R. v. Q.(E.M.)* [2015 BCSC 201 (CanLII), 329 C.R.R. (2d) 29] paras 169 - 171 for the sourcing of the Crown's submission in this regard.

[60] With respect, it is not difficult to imagine a reasonably foreseeable hypothetical situation that is less aggravated than the facts of *C.F.*, which involved an adult forcing a child to touch his penis. To be fair, it seems that counsel for the accused

in *C.F.* did not present the court with any reasonable hypotheticals. As well, the court relied on the fact that the one-year MMS in s. 151(a) had never been found to violate s. 12. While this was accurate at the time, s. 151(a) has since been found to violate s. 12 in several cases: *Scofield*; *Hood*; *Caron Barrette*; *M.L.*; *S.(J.D.)*; *Hussein*; *Ali*, *S.J.P.* Furthermore, the British Columbia trial decision on which the Court relied, *Q.(E.M.)*, has been effectively overruled by *Scofield*.

[61] In *R. v. Gumban*, 2017 BCPC 226 (CanLII), the court concluded that the 90-day MMS in s. 151(b) was not grossly disproportionate when applied to the offender before the court. The court also considered two hypotheticals. In the first, a 20-year-old Aboriginal offender of good character who had himself been the victim of sexual abuse engaged in sexual activity with a person who is actually five years younger than him. In the second, the same offender believes the other person to be 16, but fails to take reasonable steps to confirm this. The court in *Gumban* found these hypotheticals to be “far-fetched” and was of the view that a 90-day sentence would not be grossly disproportionate. With respect, I disagree on both points. As the facts of *J.G.* illustrate, a situation in which consensual sexual activity occurs between individuals who are just slightly more than five years apart in age is not far-fetched. Depending on the nature of the contact and the antecedents of the accused, a 90-day prison sentence may well be grossly disproportionate in such circumstances.

[62] I note that there have been unsuccessful s. 12 challenges to the 45-day MMS that was in effect before 2012: *R. v. S.A.*, 2016 ONSC 5355 (CanLII); *R. v. Aldersley*, 2018 BCSC 734 (CanLII).

[63] For all of these reasons, I agree with the trial judge that there are reasonably foreseeable circumstances in which the 90-day MMS in s. 151(b) of the *Criminal Code* would result in a sentence that is grossly disproportionate. The section therefore infringes s. 12 of the *Charter*.

[59] Suffice it to say that I agree entirely with the foregoing reasoning. Certainly, as pointed out by the Crown, inviting someone under age of 16 years to sexual touching is distinct from actually touching them. That said, it is difficult to imagine circumstances where, all other things being equal, the invitation would be worse than the touching itself.

[60] Like s. 151, s. 152 prohibits a broad range of conduct. The scope of the potential seriousness is also large in both cases. Where an offence has a broader range in terms of the potential conduct it captures, there will be a broader range of

reasonable hypotheticals. Consequently in such cases an MMP may be more vulnerable to a constitutional challenge under s. 12: *Nur*, at para. 82; *Lloyd*, at paras. 27 – 33.

[61] One can easily think of hypotheticals that while not typical are not farfetched in which any imprisonment, let alone imprisonment of 90 days would be grossly disproportionate. To do this, the examples provided in *Drumonde* need only be altered to change the sexual touching to an invitation to do the same.

[62] One such example would be 20-year old indigenous accused with no criminal antecedents living in a remote aboriginal community, who has herself been a victim of sexual abuse inviting a person 5 years younger, whom she believes to be over 16 but fails to take reasonable steps to confirm her belief, to kiss and/or caress her. She is extremely remorseful and pleads guilty at the earliest opportunity. One need not add to this scenario further foreseeable elements such as even more extensive *Gladue* background factors, cognitive impairment and/or psychological disorders in order to conclude that a 90-day jail term would outrage standards of decency to the extent that reasonable members of the public would find the punishment abhorrent or intolerable.

6) Is the MMP provided for in s. 152(b) justified under s. 1 of the Charter?

[63] The Crown has provided no argument and made no attempt to justify the breach of s. 12 through s.1 of the Charter. The fact that it has not done so is understandable. Indeed, while it may or may not be theoretically possible to do so, I must confess that I am unable to see how an MMP that satisfies the s. 12 test of gross disproportionality could also satisfy the proportionality component of the Oakes test.

[64] In *Nur* McLachlin C.J. speaking for the majority of the Supreme Court stated:

[111] In order to justify the infringement of the respondents' s. 12 rights under s. 1 of the *Charter*, the Attorney General of Ontario must show that the law has a pressing

and substantial objective and that the means chosen are proportional to that objective. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103. *It will be difficult to show that a mandatory minimum sentence that has been found to be grossly disproportionate under s. 12 is proportionate as between the deleterious and salutary effects of the law under s. 1.*

[Emphasis Mine]

[65] In the present case, I have no hesitation in finding that the infringement of R.A.'s s.12 right has not been justified under s. 1.

7) With no MMP, what is the most appropriate sentence for R.A.?

[66] As I have said, I have concluded that a short sharp 90-day term of actual incarceration followed by one year of probation is the most appropriate sentence having regard to the principal of proportionality set out in s. 718.1 of the Code, along with the sentencing goals and principles including parity and the need to rehabilitate R.A. The seriousness of her criminal misconduct requires some form of imprisonment.

[67] Although I have determined that a conditional sentence would not be manifestly unfit under all of the circumstances, I have also concluded that such a sentence would not be viable in the case of R.A.

[68] In that regard, the following comments of Schuler C.J. in *R. v. D.H.*, 2008 NWTSC 49, are noteworthy.

[72] Although the Appellant's factum alleges that the sentence of one year imprisonment to be followed by one year probation with a condition for counselling is demonstrably unfit, in argument counsel took the position that a sentence of one year is not outside the range for this offence, but that the Appellant should have been allowed to serve it in the community pursuant to s. 742.1 of the Criminal Code. She argued that the trial judge failed to give effect to a number of factors, overemphasized denunciation and deterrence and excluded a conditional sentence as an option in this case.

[. . .]

[74] In my view, the trial judge properly reviewed the applicable factors and principles. She did not overemphasize denunciation and deterrence but rather indicated, as other cases have, that the need to accomplish those goals is pressing in child sexual assault cases. She did not exclude a conditional sentence from consideration as an option. She expressly stated that some of the statutory preconditions for a conditional sentence were met and acknowledged that there are cases from this jurisdiction and others in which conditional sentences have been imposed for sexual assault. She found that there were distinguishing factors in some of the cases and decided that a conditional sentence in this case would not serve the principles of sentencing.

[. . .]

[78] The Supreme Court of Canada has made it clear that sentencing judges have a wide discretion in the choice of the appropriate sentence and that an appeal court owes considerable deference to a trial judge on that issue: *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 at paragraph 127. In *Proulx*, where the accused was convicted of dangerous driving causing death and dangerous driving causing bodily harm, the trial judge imposed a sentence of 18 months incarceration, emphasizing denunciation and general deterrence. Chief Justice Lamer, as he then was, in giving the Supreme Court's decision, pointed out that there were also factors, such as the accused's young age, lack of a criminal record and seemingly complete rehabilitation, that made a conditional sentence appropriate. However, he found that the sentence of incarceration was not demonstrably unfit and should not be interfered with, deferring to the trial judge's assessment.

[79] In *R. v. W. (L.F.)* (2000), 140 C.C.C. (3d) 539, Chief Justice Lamer said the Court would not intervene where the sentence imposed by the trial judge was within the acceptable range of sentences that could have been imposed in the circumstances of that case. Although the Court split on whether the sentence imposed was, in fact, within the acceptable range, the principle of non-intervention was not disputed.

[80] I recognize that in *R. v. S. (R.N.)* (2000), 140 C.C.C. (3d) 553, the Supreme Court of Canada said that in circumstances where either a sentence of incarceration or a conditional sentence would be appropriate, a conditional sentence should generally be imposed. This follows from s. 718.2(e) of the Criminal Code, which provides that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders. However, even in saying that, the Court recognized that there may be circumstances where a short, sharp sentence of incarceration may be preferable to a lengthy conditional sentence. In any event, I do not

understand the Supreme Court to say that if a trial judge does not impose a conditional sentence in circumstances where either a conditional sentence or a sentence of imprisonment would be appropriate, that is an error in principle. If either is appropriate and the trial judge chooses one over the other in the exercise of her discretion, then deference should be given to that choice. This also follows from the following passage in Proulx (at paragraph 116):

[116] Sentencing judges will frequently be confronted with situations in which some objectives militate in favour of a conditional sentence, whereas others favour incarceration. In those cases, the trial judge will be called upon to weigh the various objectives in fashioning a fit sentence. As LaForest J. stated in *R. v. Lyons*, [1987] 2 S.C.R. 309 at p. 329, 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193, "[i]n a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender". There is no easy test or formula that the judge can apply in weighing these factors. Much will depend on the good judgment and wisdom of sentencing judges, whom Parliament vested with considerable discretion in making these determinations pursuant to s. 718.3.

[81] In this case the sentence is not outside the acceptable range and not demonstrably unfit. Although there are factors in this case which might have made a conditional sentence appropriate, there are others that militated against a conditional sentence. The trial judge made her assessment, she is entitled to deference and I would not interfere with the sentence.

[82] The appeal from sentence is dismissed.

[69] There are certainly factors in the present case that would generally militate in favour of a conditional sentence. Based on the MMP's "floor" of 90 days, the Crown is asking for a relatively short period of imprisonment of 4 months followed by probation. In making this submission, the Crown takes into account R.A.'s *Gladue* factors and other personal circumstances. Ordinarily a properly crafted conditional sentence of longer duration might well meet the sentencing goals of denunciation and deterrence that are necessary in this case. Such a sentence would be more restorative in the sense that R.A. would not be removed from her home community and culture.

[70] In this case, my primary reason for concluding that a conditional sentence would not be appropriate is R.A.'s history of breaching probation orders. As I indicated earlier, she was placed on probation for 2 years on May 19th of 2016. She breached the probation order on August 10th of 2017 and was sentenced to a \$500.00 fine later that year on September 20th. Less than 4 months later she committed the offence I am dealing with, once again breaching the probation order by violating the condition that she keep the peace and be of good behaviour.

[71] Conditional sentences are punishment and are therefore typically considerably more arduous than probation orders. The stricter conditions such as house arrest are often found to be difficult and the temptation to breach them difficult to resist. Additionally, in order to adequately address denunciation and deterrence, conditional sentences are usually of a substantially longer duration than the terms of actual imprisonment that would otherwise be imposed. Given her criminal antecedents, I have concluded that R.A. would have great difficulty following the terms of an appropriately crafted conditional sentence. I find that that repeated breaches would be very likely to the extent that a conditional sentence is not viable.

[72] The reason I have concluded that 90 days of imprisonment rather than the 4 months suggested by the Crown is appropriate, is that with no MMP, the statutory minimum sentence that would otherwise apply is lowered from 90 days imprisonment to a discharge. The existence - or in this case the non-existence - of an MMP is a factor that must be considered when determining how to apply sentencing principles including deterrence and denunciation.

[73] In *R. v. Lyta*, 2013 NUCA 10, the Nunavut Court of Appeal stated:

[16] [. . .] we reject the sentencing judge's approach to statutory minimums in one respect. His reasons state that a sentence higher than the statutory minimum should be imposed only if a consideration of the sentencing principles suggests a higher sentence would be necessary. We take this to mean that an appropriate sentence can be derived from general sentencing principles, without considering that Parliament has mandated a minimum sentence. *With respect, this approach seems to undervalue the existence of the statutory minimum and might be taken to mean that a higher than minimum sentence*

would be imposed only on an unusually bad offender committing an unusually bad offence. We do not consider that to have been Parliament's intention.

[17] *Rather, the existence of a statutory minimum is a factor that must be put into the mix when applying the general sentencing provisions of the Criminal Code to a particular offender. It clearly narrows the available range of sentences and, over time, will no doubt lead to inflating sentences for such offences: R v Guha, 2012 BCCA 423 (CanLII) at para 33, 328 BCAC 303. [. .]*

[Emphasis Mine]

[74] It seems logical that the converse must also apply. Had I not found the MMP of 90-days imprisonment to have been unconstitutional, I would have been entirely in agreement with the Crown's position as to an appropriate jail term. However, with no MMP, I find that a reduction is required. I have concluded that 90 days as opposed to 4 months imprisonment is the most appropriate sentence given all of the circumstances of the offence and offender that I have already reviewed at length.

[75] Notwithstanding her prior breaches, probation remains desirable in order to address R.A.'s rehabilitation. The conditions in the probation order I am going to impose will be much easier for her to follow than the punitive conditions that would be necessary in a properly crafted conditional sentence. I am entirely in agreement with the term of probation suggested by both counsel. I am also of the view that the ancillary orders requested by the Crown are necessary in order to adequately protect the public.

CONCLUSION

[76] Having found the MMP that would otherwise have been applicable in this case to be invalid, the sentence imposed is as follows:

- Imprisonment for 90 days;
- Probation for 1 year with the conditions that R.A.:

- a) keep the peace and be of good behaviour,
 - b) appear before the court when required to do so by the court,
 - c) notify the court or probation officer in advance of any change of name or address and promptly notify the court or probation officer of any change of employment or occupation,
 - d) report to her probation officer within 2 business days of release from imprisonment, and thereafter when and as directed by the probation officer,
 - e) have no contact or communication whatsoever directly or indirectly with N.C., and
 - f) participate in any and all counselling as directed by the probation officer, including but not limited to educational endeavours and any psychological assessment including intelligence assessments deemed appropriate and directed by the probation officer;
- A 3-year order pursuant to s. 161 of the *Criminal Code*, prohibiting R.A. from:
- a) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 16 years; and
 - b) having any contact – including communicating by any means – with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate;
- An order pursuant to s. 490.012 of the *Criminal Code* that R.A. comply with the provisions of s. 7.1 of the *Sex Offender Information Registration Act* for a period of 20 years;
- An order pursuant to s. 487.051 of the *Criminal Code* authorizing the taking of bodily Substances for Forensic DNA Analysis.

[77] I thank counsel for their assistance in this matter.

Robert Gorin
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 17th day of June, 2019

R. v. R.A., 2019 NWTTC 10

Date: 2019 06 17
File: T-1-CR-2018-000295

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

– and –

R.A.

**WRITTEN REASONS FOR DECISION
of the
HONOURABLE JUDGE ROBERT GORIN**

[Ss. 12 & 1 *Canadian Charter of Rights and Freedoms*; s. 52
Constitution Act, 1982; s. 152(b) *Criminal Code*]

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person. Some details may have been edited to ensure that the victim may not be identified.