

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

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**-and-**

**MARLOWE KAPOLAK**

---

**REASONS FOR SENTENCE**

**OF THE**

**HONOURABLE JUDGE CHRISTINE GAGNON**

---

This decision is subject to a ban on publication pursuant to s. 486.4 of the Criminal Code with respect to the name of the victim as well as any information that would identify this person.

Heard at: Yellowknife, Northwest Territories

Date of Hearing: March 13, 2020

Date of Decision: July 10, 2020

Counsel for the Crown: Billy Wun

Counsel for the Accused: Jessi Casebeer

[Section 271 of the *Criminal Code*]

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

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**-and-**

**MARLOWE KAPOLAK**

---

**REASONS FOR SENTENCE**

**OF THE**

**HONOURABLE JUDGE CHRISTINE GAGNON**

---

This decision is subject to a ban on publication pursuant to s. 486.4 of the Criminal Code with respect to the name of the victim as well as any information that would identify this person.

**INTRODUCTION**

[1] The accused plead guilty on August 27, 2019 to the offence of sexual assault contrary to section 271 (b) of the *Criminal Code*, which he committed on March 29, 2019 in the City of Yellowknife, in the Northwest Territories. As the Crown elected to proceed on summary conviction, and the victim was 15 years old, the accused is liable to a maximum sentence of imprisonment not exceeding eighteen months<sup>1</sup>, and to a mandatory minimum term of imprisonment for 6 months.

---

<sup>1</sup> As a result of Bill C-75, this maximum penalty is now for a term not more than two years less one day; it was not the law at the time of the offence. The common law rule, is that an accused must be punished under the substantive law in force at the time the offence was committed, (if this punishment was lesser) enshrining the fundamental notion that criminal laws should generally not operate retrospectively (Martin, J. in R. v. Poulin, [2019] SCC 47 at par. 59), and s. 11(i) of the Charter provides that when a penalty was varied between the date of the offence and the date of sentencing, the accused benefits from the lesser punishment.

[2] On January 9, 2020, Counsel for the accused filed a Notice of Motion, seeking an Order that the mandatory minimum sentence not apply to him on the grounds that it violates his right protected by section 12 of the *Canadian Charter of Rights and Freedoms*.

[3] Section 12 of the *Charter* guarantees that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

## **FACTUAL BACKGROUND**

[4] On March 29, 2019, at about 5:30 pm, S.H. was walking her dog on a residential street in Yellowknife; it was not dark outside, there being more than 16 hours of daylight by that time of the year. The accused walked up to the victim, with whom he was familiar, and he engaged in random conversation with her. He grabbed her and pulled her close to him, he touched her bottom, her breasts and her vagina over her clothing. He grabbed her by the hips, pulled her back and tried humping her buttocks, then he tried to place his fingers between her legs. The victim kept telling him to stop, she was calling for help, but he did not stop. She pushed him, punched him and tried to kick him in the testicles to make him stop, but he would not disengage. As she tried to run away, he grabbed her arm and pulled her back, moving in front of her to block her way; he touched her breast and vagina area. The assault lasted about eight minutes and she eventually was able to run away. The accused was 18 years old at that time, he is of very small height and build, and his appearance is childlike.

## **POSITIONS OF THE PARTIES**

[5] The Crown takes the position that the appropriate range of sentence for this offence, committed in these circumstances, is a term of imprisonment of three to six months, and that accordingly, the mandatory minimum sentence of imprisonment for six months is appropriate. While they acknowledge that the mandatory minimum jail sentence is at the high end of the range, they say that it would not be so demonstrably unfit as to justify not to apply the law. They also say that there is insufficient evidence to conclude that the effect of the mandatory minimum sentence on the accused would be grossly disproportionate. The essence of the Crown's submissions is that if the fit sentence falls within a range that includes the mandatory minimum sentence, the constitutional argument is moot.

As a result, Crown has not presented any argument to justify the mandatory minimum sentence under section 1 of the *Charter*.

[6] Counsel for the accused says that the accused should receive a conditional sentence of imprisonment, of ninety to one hundred and twenty days, which would be possible were it not for the mandatory minimum jail sentence prescribed at section 271 (b) *CC*. This would be followed by an eighteen-month period of probation.

[7] They recognize that a form of custody is appropriate to acknowledge the seriousness of the offence, but they argue that the accused deserves to serve his sentence in the community, given that he does not have a criminal record, and that the totality of the circumstances suggest that he would not pose a risk to the community. They say that a term of imprisonment for six months is grossly disproportionate, taking into consideration the unique personal circumstances of the accused (which include the fact that he is of aboriginal ancestry, and the fact that he suffers from an intellectual disability), and they seek a declaration that the mandatory jail sentence is of no force and effect.

## **SENTENCING REGIME FOR SEXUAL ASSAULT AND EMPHASIS ON THE PROTECTION OF CHILDREN AND VULNERABLE PERSONS**

[8] Section 271 of the *Criminal Code* has been amended many times since its enactment to reflect more appropriately the inherent harmfulness of sexual assaults, in particular when committed on children. Parliament has recently increased the maximum penalty from 18 months to two years less one day on summary conviction<sup>2</sup> and it increased the maximum sentence for sexual assaults on children to a term of imprisonment for fourteen years when the Crown proceeds on indictment.<sup>3</sup> In 2012, Parliament introduced a mandatory minimum sentence of imprisonment for 90 days for sexual assaults committed against children<sup>4</sup>, which was increased to six months in 2015 through the *Tougher Penalties for Child Predators Act*.

[9] Parliament has mandated that sentences for sexual offences against children must increase.<sup>5</sup> By raising the maximum sentences, Parliament is signalling a need

---

<sup>2</sup> Bill C-75, which received Royal Assent on June 21, 2019

<sup>3</sup> *Tougher Penalties for Child Predators Act*, SC 2015, c. 23, s. 14

<sup>4</sup> *Safe Streets and Communities Act*, SC 2012, c. 1, s. 25

<sup>5</sup> *R. v. Friesen*, 2020 SCC 9, at par. 95

to shift the range of proportionate sentences as a response to the recognition of the gravity of these offences.<sup>6</sup>

[10] Correlative changes have been made, over time, to the wording of existing sentencing principles; and objectives were added to the Criminal Code to emphasize the need to protect children and vulnerable persons through the imposition of deterrent sentences. These include:

**Section 718.01:** When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.<sup>7</sup>

**Section 718.04:** When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances – including because the person is Aboriginal and female – the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.<sup>8</sup>

**Section 718.2(a)(ii.1):** evidence that the offender, in committing the offence, abused a person under the age of eighteen years, (...) shall be deemed to be (an) aggravating circumstance(s);<sup>9</sup>

**Section 718.2(e):** all available sanctions, other than imprisonment, that are reasonable in the circumstances *and consistent with the harm done to victims or to the community*<sup>10</sup> should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

## RECENT SUPREME COURT DECISIONS WITH RESPECT TO SEXUAL OFFENCES COMMITTED AGAINST CHILDREN

[11] In its decision of *R. v. Morrison*<sup>11</sup>, the Supreme Court of Canada declined to pronounce on the constitutional validity of the mandatory minimum punishment for child luring, having decided to order a new trial, and feeling that this determination may be best left to the trial judge should they convict the accused.

[12] In separate opinions, however, Justice Moldaver (to whose opinion subscribed C.J. Wagner, and Justices Gascon, Côté, Brown, Rowe, and Martin) declared in *obiter* that in his view, the mandatory minimum sentence of

---

<sup>6</sup> *idem*, at paragraph 109

<sup>7</sup> SC 2005 c.32 s. 24

<sup>8</sup> Bill C-75, section 292.1, effective September 19, 2019

<sup>9</sup> S.C. 2005, c. 32, s. 25 (ii.1)

<sup>10</sup> SC 2015 c.13 s. 24

<sup>11</sup> 2019 SCC 15, March 15 2019

imprisonment for one year may be “vulnerable to constitutional challenge”<sup>12</sup>, while Justices Karakatsanis and Abella declared in *obiter* that they felt the mandatory minimum term of imprisonment for one year was grossly disproportionate and that it violated s. 12 of the *Charter*.

[13] In the matter of *R. v. Friesen*<sup>13</sup>, the Supreme Court of Canada was asked to consider the appropriateness of a starting point or range in sentencing. While the unanimous decision was that sentencing ranges and starting points are guidelines rather than hard and fast rules, the Court seized this opportunity to offer guidance in relation to sentencing for sexual assaults against children. They specifically addressed Parliament’s decision to increase the maximum penalties and directed

provincial appellate courts to revise and rationalize sentencing ranges and starting points, where they treated sexual violence against children and sexual violence against adults similarly,<sup>14</sup>

adding that courts should correct this error “by increasing sentences for sexual offences against children”. The Supreme Court emphasizes that sexual offences against children are inherently wrongful and that they “always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.”<sup>15</sup>

[14] At the same time in its lengthy *obiter*, the Supreme Court of Canada, reiterating the importance of proportionality, stated that personal circumstances of offenders, for example, offenders who suffer from mental disabilities that impose serious cognitive limitations, can have a mitigating effect.”<sup>16</sup> because the accused likely have a diminished moral culpability.

[15] The Supreme Court also reiterated that where the person before the court is Indigenous, courts must apply the principles of *R. v. Gladue* and *R. v. Ipeelee*, “even in extremely grave cases of sexual violence against children”.<sup>17</sup> This is an indication that despite the strong views expressed by the Supreme Court about the need for deterrence with regard to persons offending against children, they also recognize that there may be circumstances that justify principled differential treatment.

## THE SECTION 12 ANALYTICAL FRAMEWORK

---

<sup>12</sup> *R. v. Morrison*, at paragraphs 146 and 148

<sup>13</sup> 2020 SCC 9, April 2, 2020

<sup>14</sup> *op. cit.* at paragraphs 117 and 118

<sup>15</sup> *op. cit.* at paragraph 76

<sup>16</sup> *op. cit.* at paragraph 91, also *R. v. Scofield*, 2019 BCCA 3, and *R. v. Hood*, 2018 NSCA 18

<sup>17</sup> *R. v. Friesen*, *op. cit.* at paragraph 92; *R. v. Ipeelee*, 2012 SCC 13 at paras. 73, 76, 84-86

[16] 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.<sup>18</sup> However, if it concludes that it would make a difference, then the court engages in the constitutional analysis.

[17] In order to decide on the constitutionality of a mandatory minimum penalty, the inquiries to be made are:

- 1) Would the MMP be grossly disproportionate in the case of this accused; and if not,
  - 2) Would the MMP be grossly disproportionate in reasonably foreseeable cases?
- and if the answer in either case is “yes”, the MMP violates s. 12 of the *Charter*<sup>19</sup>.

[18] In *R. v. Lloyd*, the Supreme Court of Canada concluded that a provincial court judge has the power to consider the constitutional validity of the challenged sentencing provision, and that the effect of a finding by that court that a law does not conform to the Constitution is to permit the judge to refuse to apply it.<sup>20</sup>

## ANALYSIS

### Is The Issue Moot?

[19] In the case before me, the accused is a youthful aboriginal offender, who does not have a criminal record, and who meets the DSM-V criteria for an Intellectual Disability. Although the circumstances of the offence are serious, the personal circumstances of this accused justify considering alternatives to imprisonment. I find that the constitutional issue is not moot.

### The First Part Of The Inquiry

[20] The court must first decide,

“on a rough scale, what a fit sentence would be in the circumstances, having regard to the sentencing principles and objectives set out in the Criminal Code. The Court must then decide whether the mandatory minimum is grossly disproportionate to that fit and proportionate sentence; in making that determination, a number of factors must be considered: the gravity of the offence; the particular circumstances of the offender; the actual effects of the punishment on the offender; the penological goals and sentencing

---

<sup>18</sup> R. v. R.A., op. cit., at par. 35; see also R. v. Lloyd, 2016 1 R.C.S. 13

<sup>19</sup> R. v. Nur, 2015 SCC 15, at par. 46; R. v. R.A., op. cit. at par. 34; R. v. Lafferty, 2020 NWTSC 4

<sup>20</sup> 2016 1 R.C.S. 13 at par. 19 (Defense Book of Authorities, at tab 7)

principles that underlie the mandatory minimum; and a comparison of punishments imposed for similar crimes”.<sup>21</sup>

### What Would Constitute A Fit Sentence For This Accused?

#### a) Aggravating Factors

[21] The Supreme Court of Canada in its very recent decision of *R. v. Friesen*<sup>22</sup> is directing the courts to consider what they view as aggravating factors, or to use their language: “non-exhaustive significant factors to determine a fit sentence for sexual offences against children”. These include: the risk to reoffend, the abuse of a position of trust, multiple incidents for long periods of time; the age of the victim (with an enhanced blameworthiness when the victim is very young).

[22] The presence of an intellectual disability that affects the accused’s cognitive functions makes it difficult to assess the risk to reoffend. I find that the risk is present, but in light of other circumstances, I don’t view the risk as high, or determinative. There was a single occurrence, and the assault itself was of a certain duration before the victim was able to run away.

[23] The statutorily aggravating factors are the age of the victim, and the fact that she is a vulnerable child; the other aggravating factors identified in *Friesen* are not present here. The fact that the offence of sexual assault is prevalent in our Northern communities<sup>23</sup>, which was 5.3 times the national ratio in 2017 is also aggravating.

#### b) Mitigating Factors

[24] The early guilty plea is highly mitigating, as it spares the victim from having to testify in court. The accused entered a guilty plea at an early opportunity, bringing closure to the victim.

[25] There is no allegation that the accused breached his conditions of release. Although the conditions are not stringent, they have been in place since April 15, 2019. There is no allegation that the accused committed any offence while being on judicial interim release.

---

<sup>21</sup> R. v. Bernarde, at paragraphs 7 and 8; R. v. Morrisey at paras 35-49; see also R. v. R.A. at para 20; R. v. Goltz [1991] 3 S.C.R. 485

<sup>22</sup> op. cit, at paragraphs 121-147

<sup>23</sup> Statistics Canada, Crimes by type of violation, and by province and territory; Summary table no 21, release date July 24, 2017



### c) The Personal Circumstances

[26] The personal circumstances of the accused, which include the diagnosis of Alcohol-Related Neuro-Developmental Disorder, suggest a reduced moral blameworthiness. In the matter of *R. v. Ramsay*, the Alberta Court of Appeal was of the view that

A diagnosis of FASD also affects the principles of denunciation and deterrence (both specific and general). (...) The degree of moral blameworthiness must (...) be commensurate with the magnitude of the cognitive deficits attributable to FASD.

[27] In the matters of *Ramsay*<sup>24</sup>, *Bernarde*<sup>25</sup> and *Katigakyok*<sup>26</sup>, the courts have adopted the view expressed by the Supreme Court of Canada in *R. v. Ipeelee*,<sup>27</sup> that consideration of the moral blameworthiness of the accused must not be elevated at the expense of the gravity of the offence, which includes an assessment of public safety. They found that the cognitive impairment of the accused is one circumstance, among others.

### d) Would There Be Alternatives To Imprisonment That Are Reasonable Under The Circumstances, If They Were Available?

[28] Considering the circumstances of the offence, and despite the aggravating factors, I find that a term of imprisonment is not the only reasonable sanction. For a first offender, sentencing usually focuses on rehabilitation. There is nothing to say that a community-based sentence would not work for this accused. The risk to reoffend that this accused presents because of the impulsivity associated with his condition, as well as his intellectual limitation, is compensated by the fact that he benefits from family support. He has a home in which supervision may occur, and he has shown that he is able to comply with conditions.

[29] For an offender with challenges to his executive functions, repetition of instructions, structure, and professional follow-up, appear to be key.<sup>28</sup> A carefully crafted conditional sentence order can bring the necessary restrictions to a person's freedom while providing these rehabilitative tools, and thus achieve deterrence. A short sentence of imprisonment, which could be served intermittently, would also achieve this objective. As the Alberta Court of Queen's Bench wrote in the matter of *R. v. Esposito*<sup>29</sup>, "while a jail term is most commonly associated with a sentence

---

<sup>24</sup> 2012 ABCA 257 (Tab 1 of the Crown's supplemental book of authorities)

<sup>25</sup> 2018 NWTCA 7; 2018 NWTSC 27

<sup>26</sup> 2019 NWTTC 12

<sup>27</sup> [2012] SCC 13

<sup>28</sup> Neuro-Developmental Assessment Report, at p. 5, last two paragraph

<sup>29</sup> [2020] A.J. No. 303

that emphasizes deterrence and denunciation, it is important to recall that the Supreme Court in *Proulx*, [2000] 1 S.C.R. 61, concluded that a conditional sentence is “also a punitive sanction capable of achieving the objectives of denunciation and deterrence.”: at para. 22”. I find that a conditional sentence order would be a fit and proportionate sanction.

### Is The Mandatory Minimum Penalty Grossly Disproportionate For This Accused?

#### a) The Vulnerability Of The Mandatory Minimum Sentence

[30] The mandatory minimum penalty for a sexual assault committed on a person under the age of sixteen applies to an accused regardless of the circumstances of the offence, and regardless of factors such as being of aboriginal ancestry, or suffering from cognitive deficits which may reduce this person’s moral blameworthiness.

[31] While the sentencing options for sexual assault against a person under the age of sixteen have been curtailed, the definition of sexual assault remains broad, including a wide range of conduct from an unwanted kiss to forced intercourse.

[32] Given the fundamental principle of proportionality central to our sentencing regime, such breadth makes the mandatory minimum sentence of imprisonment vulnerable to *Charter* scrutiny. The Supreme Court of Canada has said that much in *Morrison*, without deciding if they would find it to be grossly disproportionate. The position taken by the majority of the Supreme Court of Canada in *R. v. Nur*<sup>30</sup> and *R. v. Lloyd*<sup>31</sup> has not been altered by the recent decisions rendered by the Supreme Court, and continues to be that

mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence. One solution is for such laws to narrow their reach, so that they catch only conduct that merits the mandatory minimum sentence. Another option to preserve the constitutionality of offences that cast a wide net is to provide for residual judicial discretion to impose a fit and constitutional sentence in exceptional cases.<sup>32</sup>

#### b) The Standard

---

<sup>30</sup> 2015 SCC 15

<sup>31</sup> 2016 SCC 13

<sup>32</sup> *R. v. Lloyd*, op.cit., at par. 3

[33] The Supreme Court of Canada determined that the standard for finding that a sentence represents a cruel and unusual punishment is that it be grossly disproportionate, and they offered the following definition:

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.”<sup>33</sup>

[34] But importantly, the Supreme Court of Canada added that the wider the range of conduct and circumstances captured by the mandatory minimum, the more likely it is that the mandatory minimum will apply to offenders for whom the sentence would be grossly disproportionate.<sup>34</sup>

#### A) The Seriousness Of The Offence

[35] The seriousness of the offence requires specific and general deterrence, as well as denunciation. There was a single incident, and the victim suffered no apparent injury. This was a bold act, committed on a residential street, in the daytime, as opposed to a surreptitious act committed behind closed doors, on a sleeping victim, or in a context where the victim is physically isolated and cannot get away from the perpetrator. I take judicial notice of the inherent wrongfulness and harmfulness of sexual offences committed on children.<sup>35</sup>

[36] The victim initially did not feel threatened by the accused, because she was familiar with him, and also, likely because of his diminutive size and almost child-like appearance. But the accused then touched the victim’s body many times and in many places, and he failed to disengage when prompted verbally by her. She had to resort to physical violence to make him stop. This was a crime of opportunity, committed on impulse.

[37] Despite having been duly informed of her right pursuant to s. 722 CC, the victim did not file a Victim Impact Statement, and she did not respond to the invitation by the author of the Pre-Sentence Report to participate in an interview for the purpose of providing her perspective. I cannot fully assess the actual harm done to the victim, nor the impact that the offence had on her.

---

<sup>33</sup> R. v. Lloyd, at par. 24

<sup>34</sup> *idem*, *in fine*

<sup>35</sup> R. v. Friesen, *op. cit.*, at paras. 77 and 84

[38] I infer from her name that the victim is of Inuit ancestry. I infer from a comment by the author of the Pre-Sentence Report<sup>36</sup> that she was in foster care at the material time. In the absence of other relevant information, I take into consideration the comments made by the Chief Justice of Canada, and by Justice Rowe in *R. v. Friesen*, that “Indigenous children experience a disproportionate impact from sexual violence, as do children and youth in government care”.<sup>37</sup> I take judicial notice of the fact that “sexual violence against children can cause serious emotional and psychological harm that may often be more pervasive and permanent in its effect than any physical harm.”<sup>38</sup>

## B) The Circumstances Of The Offender

### a) The Pre-Sentence Report

[39] The Pre-Sentence Report prepared for this matter informs that the accused was born in Yellowknife, and that he is of Inuit ancestry. The accused’s mother left her partner when she was pregnant and she has kept the accused away from him. The accused’s mother told the author of the pre-sentence report that her relationship with the accused’s father was plagued with alcohol use and violence.<sup>39</sup> The accused does not appear to have ever met his biological father.

[40] As a child, the accused spent time in Nunavut with his maternal grandparents, who took him on the land and shared their traditional knowledge. They appear to still be alive, but the opportunities for them to see the accused are limited to the summer time.<sup>40</sup>

[41] There is no information with respect to whether or not the accused’s mother or her parents attended residential school. The accused was apprehended by Social Services at ages of 5 and 8 and he was placed in foster homes because of his mother’s alcohol abuse. Although this makes it clear to me that the accused was exposed to his mother’s alcohol abuse as a child, there is no evidence of what psychological impact this has had on him, over and above the physiological sequels he endures.

---

<sup>36</sup> Pre-Sentence Report, at page 9 – Interview with victim(s)

<sup>37</sup> *R. v. Friesen*, op.cit., at paras. 70 and 71

<sup>38</sup> *idem*, at par. 56; *R. v. McCraw*, [1991] 3 S.C.R. 72 at p.81

<sup>39</sup> Pre-sentence Report, page 3

<sup>40</sup> PSR at p. 7

[42] Because he showed behavioural issues, the accused was also sent to treatment centers, first in Fort Smith and Yellowknife, and later at the Wood's Homes Treatment facility in Calgary, Alberta, where he spent almost two years. I conclude that he was separated from his biological mother at a young age, and for lengthy periods of time, and that this must have impacted him psychologically.

[43] At the age of 16, he returned to his mother's care in Yellowknife. He currently lives with her and his younger sister in a three-bedroom home. I was not provided information about this family socio-economic condition, but the pre-sentence report informs me that the accused is not employed, and that he receives a disability pension of 800\$ per month. He has not completed his secondary education. His reading skill is at the level of grade 2 or 3.

[44] The Pre-Sentence Report suggests that as he was growing up, the accused struggled academically<sup>41</sup>, that he had a tendency to act out<sup>42</sup>, and that he struggled to follow rules and regulations when he was placed in various treatment centres.<sup>43</sup> Since he returned to live with his mother, his behaviour is said to have improved. He helps out at home with daily chores, but he does not appear to have a clear plan with respect to living independently. The author observed that the accused presented as naive and youthful, and that he was uneducated about sexual and social behaviours.

[45] The accused's mother made attempts to obtain an assessment for the purpose of making a Public Guardianship application. The waiting time for such an application to be processed is two years. His mother appears to be supportive, and she is trying to provide structure for him. Of note, despite the known diagnosis, the accused has not been referred to any particular form of assistance or program.

#### b) The Neuro-Developmental Assessment Report

[46] The accused suffers from moderate intellectual disability, and from Alcohol Related Neurodevelopmental Disorder (ARND).<sup>44</sup> As a result of this condition, the accused has difficulty retaining information, and he struggles with cause and effect. He would also be prone to impulsivity. The author of the assessment report wrote that the accused "continues to show considerable difficulty understanding verbal instructions and carrying on verbal communication." She adds that "he is able to participate in household tasks, but needs support and reminders to be able

---

<sup>41</sup> page 5 of the Pre-Sentence Report

<sup>42</sup> pages 4 and 6 of the PSR

<sup>43</sup> page 4 of the PSR, third full paragraph

<sup>44</sup> Neuro-Developmental Report prepared by Ms. Merrill Dean, September 2019

to complete them.”, and that his cognitive and adaptive functioning impairments are significant and stable.”<sup>45</sup>

c) Other Circumstances Or Characteristics

[47] The accused has never been convicted of an offence. There is no allegation that the accused breached his conditions of release; although the conditions were not stringent, they have been in place since April 15, 2019. There is no allegation that the accused committed any offence while being on judicial interim release.

C) The Actual Effects Of The Punishment On The Offender

a) The Expert Evidence And Neuro-Developmental Assessment Report

[48] The Defense called an expert witness to explain the neuro-developmental condition of the accused. This expert, Ms. Merrill Dean, is a registered psychologist, and she was qualified to provide an opinion with respect to cognitive capacity. The focus of her opinion was on the potential effect that a sentence of imprisonment may have on the accused.

[49] Her finding about the accused was that because of his serious cognitive limitations, and because he is physically small and he presents as significantly younger than his chronological age, he is likely to be vulnerable, and to be unable to care for himself, if he is ordered in custody. The Defense relies on Ms. Dean’s opinion and suggests that “the physical and psychological impact of incarceration upon this particular offender will be acute”.<sup>46</sup>

[50] The Crown challenges the weight of Ms. Dean’s opinion that the accused would be at risk if he were to be placed in custody. The Crown Prosecutor says that Ms. Dean’s area of expertise is limited to behaviour in an educational context, and that she has no knowledge or experience with regard to a prison environment.

[51] Ms. Dean offered her opinion in relation to her direct observation and knowledge of the accused. She described the accused as gullible, and she added that he can be taken advantage of because he does not pick up on social cues; she also said that he has poor social judgment. I find that these observations are within her area of expertise.

---

<sup>45</sup> *idem*, at p. 5

<sup>46</sup> Applicant’s Factum, par. 17

[52] Ms. Dean said that the accused would struggle in jail, and she is of the view that there are no appropriate programs for a person like him. I note that my colleague Judge Molloy appeared to accept the proposition that “our prison systems are generally ill-equipped to deal with the mentally ill or cognitively impaired” in the matter of *R. v. Katigakyok*, in which Ms. Dean also provided her expert opinion.

[53] While I note that no evidence was offered with respect to the programs and the conditions of detention in Northwest Territories facilities for an offender who is diagnosed with an intellectual disability, I take judicial notice of the fact that the River Ridge Correctional Center in Fort Smith, NT, offers programs for offenders with “special needs”.

[54] Although I accept Ms. Dean’s assessment of the accused’s neuro-developmental condition, I find that her opinion with respect to the actual effect of a potential jail sentence on the accused is an extrapolation of her analysis of the accused, without a study of the local correctional facilities and what they offer or not by way of programming and conditions of detention. This lack of evidentiary foundation weakens the value of her opinion.

[55] The helpful aspect of the expert opinion lies in the description of how the accused processes information, suggesting that he benefits from structure, and from repetitive reinforcement.<sup>47</sup> Such information assists in determining the rehabilitative needs of the accused.

#### b) Other Considerations

[56] With respect to the accused’s inability to link cause, effect and consequence, the passage of time becomes relevant. As a result of a combination of circumstances, some of which were beyond his control, the accused will be sentenced more than a year after the date of the offence. Given that the accused struggles with abstract concepts, it is unknown if he will grasp that the sentence he receives now is a consequence for his actions of March 29, 2019. Likewise, a sentence of imprisonment may not achieve the objective of specific deterrence for this accused because of his inability to learn by associating action and consequence.

[57] The most significant aspects here are that the accused is a very young adult, and that he appears to have no experience with the courts or with jail. For any

---

<sup>47</sup> Neurodevelopmental Assessment Report, at page 5, paragraphs 4, 5 and 6 in the Summary

person in that situation, any length of time spent in jail may be traumatising, whether or not his cognitive abilities are impaired. I consider that the impact of a jail sentence on this accused may be disproportionate to the actual need for deterrence and denunciation.

[58] Also, because this is a first sentence for this offender, there is no objective evidence to suggest that jail is the only way to deter this accused, and that education and counselling would not be an appropriate way to address the root causes of the offending behaviour.

#### D) The Penological Goals And Sentencing Principles That Underlie The Mandatory Minimum Punishment

[59] This case illustrates the competing social interests and penological goals, so often at play in our Northern context, that are the need to protect children and vulnerable victims, and the need to address the over incarceration of aboriginal offenders.

[60] The Crown relies on *R. v. F.C.*<sup>48</sup> and submits that “child sexual abuse deserve(s) denunciation because of the terrible and unknown long term consequences”. Denouncing child abuse and protecting children are important penological goals.

[61] The Crown also referred to the matter of *R. v. J.J.B.*<sup>49</sup>, and argued that notwithstanding that the Court found that the mandatory minimum punishment infringed s. 12 of the *Charter*, this decision may be relied upon for this particular statement:

the goal of the mandatory minimum penalty, which is to protect children from sexual predators and prevent the harmful impact on children of such offending, is a valid penological goal and addresses a justifiable concern.

[62] The Defense focused on section 718.2(e) of the *Criminal Code* and reminded this Court that all alternatives to imprisonment that are reasonable in the circumstances, and consistent with the harm done to victims or to the community should be considered. They argue that the accused’s blameworthiness is reduced because of his cognitive impairment due to ARND.

---

<sup>48</sup> 2016 ONCJ 302 at para. 20 : Crown’s factum, at para 32

<sup>49</sup> 2019 BCJ No 2481, Crown’s Factum at para. 39-44; see also: *R. v. Friesen*, 2020 SCC 9, at paragraph 42



[63] I find that the following comments of the Alberta Court of Appeal in *R. v. Ramsay* are relevant:

Where the cognitive deficits experienced by the offender significantly undermine the capacity to restrain urges and impulses, to appreciate that his acts were morally wrong, and to comprehend the causal link between punishment imposed by the court and the crime for which he has been convicted, the imperative for both general deterrence and denunciation will be greatly mitigated.<sup>50</sup>

[64] They also added that there is nevertheless a place for denunciation and deterrence in sentencing offenders whose cognitive abilities are impaired, using the analogy of a sliding scale.<sup>51</sup> I agree with this reasoning, and in addition, I find that the incarceration of an accused about one and a half years after the offence was committed might not produce the intended outcome for a person presenting cognitive challenges, if this person does not associate in an abstract way cause, effect, and consequence.

[65] Although the Defense did not place too much emphasis on this point, I consider as a matter of principle that the fact that the accused is of Inuit ancestry should not be overlooked, because reducing the over-incarceration of Aboriginal offenders continues to be an important social objective.

[66] To illustrate the fact that this issue is still live, Statistics Canada reported that “in 2017/2018, Aboriginal adults accounted for 30% of admissions to provincial/territorial custody and 29% of admissions to federal custody, while representing approximately 4% of the Canadian adult population”.<sup>52</sup> They noted an increase of about 8 percentage points over ten years, while the Office of the Correctional Investigator wrote in its 2019 Annual Report that:

Indigenous peoples continue to be increasingly over-represented in our federal correctional system. Over the last decade, while admissions to federal jurisdiction have decreased, the number of Indigenous offenders has increased. In 2016-17, while only accounting for approximately 5% of Canada’s overall population, Indigenous offenders represented 23.1% of the total offender population (26.8% of the in custody population and 17.2% of the community population).

[67] In the matter of *R. v. C.S.*, the Ontario Superior Court considered that mandatory minimum sentences contributed to exacerbate the over-incarceration of

---

<sup>50</sup> 2012 ABCA 257, at par. 24; Crown’s Supplemental Book of Authorities at Tab 1 see also *R. v. Quash*, 2009 YKTC 54; *R. v. Harper* 2009 YKTC 18

<sup>51</sup> *op cit*, at paras 24, 25

<sup>52</sup> Juristat Adult and youth correctional statistics in Canada, 2017/2018

aboriginal offenders by undermining judges' ability to mitigate sentences based upon relevant contextual factors.<sup>53</sup>

[68] Regarding the appropriateness of the mandatory minimum penalty, they added that an MMP is not per se unconstitutional because of its constraint of judicial discretion to impose a fit and proportional sentence, but because they "emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime". The court referred to the matter of *R. v. Lloyd*<sup>54</sup>, and saying about the mandatory minimum penalty:

They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.

General deterrence - using sentencing to send a message to discourage others from offending - is relevant. But it cannot, without more, sanitize a sentence against gross disproportionality: "General deterrence can support a sentence which is more severe while still within the range of punishments that are not cruel and unusual" (*R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 45, per Gonthier J.).

[69] The January 2017 Department of Justice Research and Statistics Division publication, Just Facts, "Sentencing in Canada", at p. 2, records that between 2000/2001 and 2013/2014, the number of cases with an offence subject to an MMP increased 103%, from 1,838 to 3,742.

[70] Still in the *R. v. C.S.* decision, the Court referred to a 2017 statement of the Honourable Jody Wilson-Raybould, then Minister of Justice and Attorney General of Canada, who said that MMPs are not necessary to keep Canada safe and "do not have a deterrent effect", except in rare circumstances such as repeat impaired-driving cases. This observation is consistent with the Chief Justice's observation in *Nur*, at para. 114, that "[e]mpirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes. The Minister of Justice further stated that:

There is absolutely no doubt that MMPs have a disproportionate effect on Indigenous people, as well as other vulnerable populations. The data are clear. The increased use of MMPs over the past decade has contributed to the overrepresentation in our prison system of Indigenous people, racialized

---

<sup>53</sup> R v CS, [2018] OJ No 909, 2018 ONSC 1141, 145 WCB (2d) 644, 405 CRR (2d) 119, 44 CR (7th) 341, 2018 Carswell Ont 2566

<sup>54</sup> R. v. Lloyd, 2016 SCC 13, Book of Authorities of the Defense, at tab 7

communities and female offenders. Judges are well-equipped to assess the offender before them and ensure that the punishment fits the crime.

[71] That statement resonates with the conclusion of the Truth and Reconciliation Commission at pp. 240-242 of Vol. 5 of its Final Report:

Far from being kept safe by mandatory sentences of imprisonment and restrictions on community sanctions, Aboriginal communities may be less safe due to the Bill's movement away from alternatives to imprisonment.

The extended terms of Bill C-10's mandatory sentences ... will likely have a disproportionate impact on Aboriginal offenders who are overrepresented in the criminal justice system in part because of their poor socioeconomic circumstances and the effects of historical and systemic discrimination in Canadian society.

We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.<sup>55</sup>

[72] Justice Lebel in *R. v. Ipeelee* indicated that, under such circumstances, a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment per se.<sup>56</sup> He wrote, at paragraph 66:

First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities. As Professors Rudin and Roach ask, “[if an innovative] sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?” (J. Rudin and K. Roach, “Broken Promises: A Response to Stenning and Roberts’ ‘Empty Promises’” (2002), 65 *Sask. L. Rev.* 3, at p. 20).

[73] So between the Supreme Court of Canada saying in *Friesen* that sentences for sexual assaults on children **must increase** to meet the needs of the vulnerable victims, and saying in *Ipeelee* that sentencing practices **must change** (my emphasis) so as to meet the needs of Aboriginal offenders and their communities, I

---

<sup>55</sup> R v CS, [2018] OJ No 909, 2018 ONSC 1141, 145 WCB (2d) 644, 405 CRR (2d) 119, 44 CR (7th) 341, 2018 CarswellOnt 2566, paragraphs 104-109

<sup>56</sup> 2012 SCC 13

must strike the appropriate balance, and I find that these objectives are equally pressing and important.

#### E) A Comparison Of Punishments Imposed For Similar Crimes

[74] Counsel reviewed a number of cases, included in their materials. The cases tendered illustrate the wide range of possible sentences, including situations where alternatives to imprisonment were considered when the victim was not under the age of 16. The most relevant decisions are those in which the accused is a first-time offender, and there is a single incident, with few aggravating factors:

- *R. v. Dyson*<sup>57</sup>: 26 years old, gainfully employed. Not of aboriginal ancestry. The offence carried apparently less serious circumstances, which however had a strong impact on the victim. Suspension of sentence with a period of probation was favored over a conditional discharge, so as not to trivialize the offence.

- *R. v. F.R.*<sup>58</sup>: 26 years old, of Tli Cho ancestry, no criminal record. A conditional sentence order was imposed, followed by a 12-month period of probation. Exceptional circumstances included that the accused was the principal caregiver to his aging grandmother.

- *R. v. Sangris*<sup>59</sup>: 20 years old, touching victim on top of underwear. Aboriginal offender. No mandatory minimum penalty applied at the time. No criminal record, remorse, guilty plea. Conditional sentence would have been appropriate, but was now excluded by law. I imposed 1-day in jail, followed by two years' probation with strict conditions. No known special need, but the lack of prior criminal record, as well as the young age of the accused and his insight into his own conduct suggesting a high prospect for rehabilitation.

[75] In the matter of *R. v. C.V.E.B.*<sup>60</sup> involving a 79-year old accused, not Indigenous, the Court held that the 6-month mandatory minimum sentence for sexual assault violated section 12 of the *Charter* and imposed an 8-month conditional sentence. The offence in that case involved the touching of a 10-year old victim over her clothes on the breasts and vagina. The accused was elderly, with failing health. He did not have a criminal record.

[76] The Supreme Court of the Northwest Territories found that the 12-months mandatory minimum sentence of imprisonment for a sexual assault was grossly

---

<sup>57</sup> 2016 NWTTC 03, at Tab 3 of the Book of Authorities of the Defense

<sup>58</sup> 2012 NWTTC 5, at Tab 5 of the Book of Authorities of the Defense

<sup>59</sup> T-1-CR-2009-001495

<sup>60</sup> 2019 BCPC 118

disproportionate in the matter of *R. v. Lafferty*<sup>61</sup>, on the basis of reasonable hypotheticals, saying that the mandatory minimum sentence for sexual assault is also a sweeping law that casts a net over a very broad range of conduct, which was found to be fatal to its constitutionality.

[77] Similarly, in the matter of *R. v. Esposito*<sup>62</sup>, the Alberta Court of Queen’s Bench found that the mandatory minimum sentence of imprisonment for 12 months for the offence of making child pornography violated section 12 of the *Charter*. This case deals with the situation of an offender presenting with Fetal Alcohol Spectrum Disorder, with a criminal record containing very dated and unrelated entries. The sentencing judge found that a proportionate sentence was a two-year conditional sentence order, as the gravity of the offence is “offset by the Accused’s personal circumstances and reduced moral culpability.”

[78] The Territorial Court of the Northwest Territories found that the 90-day mandatory minimum sentence of imprisonment for the offence of invitation to sexual touching was grossly disproportionate on the basis of reasonable hypotheticals, in the matter of *R. v. R.A.*<sup>63</sup>

[79] The Yukon Territorial Court found that the 90-day MMP for sexual interference was contrary to s. 12 of the *Charter* in *R. v. Pye*<sup>64</sup>; and so did the Ontario Supreme Court in *R. v. Drummonde*.<sup>65</sup> That mandatory minimum sentence when the Crown proceeds by indictment has also been successfully challenged at the appellate level in a number of jurisdictions.<sup>66</sup>

[80] In the matter of *R. v. Kirby*<sup>67</sup>, the Ontario Court of Justice found that the six-month mandatory minimum jail sentence violated section 12 of the *Charter*, on the basis of reasonable hypotheticals.

## CONCLUSION

---

<sup>61</sup> 2020 NWTSC 4

<sup>62</sup> [2020] A.J. No 303

<sup>63</sup> 2019 NWTTC 10, at Tab 10 of the Book of Authorities of the Defense

<sup>64</sup> 2019 YKTC 21

<sup>65</sup> 2019 ONSC 1005

<sup>66</sup> *R. v. Caron Barrette*, 2018 QCCA 516; *R. v. Hood*, 2018 NSCA 18; *R. v. J.E.D.* 2018 MBCA 123; *R. v. Scofield*, 2019 BCCA 3; *R. v. Ford* 2019 ABCA 87.

<sup>67</sup> *R. v. Kirby*, 2020 O.J. No 233

[81] Because the mandatory minimum sentence of imprisonment for six months applies to all offenders having committed any form of sexual assault on a victim aged anywhere between 1 day and 16 years, it is vulnerable to Charter scrutiny.

[82] Imposing a sentence of six months in jail on this accused who is a first offender when there are many mitigating factors and when the circumstances of the offence, while being serious, are not too egregious, is fundamentally unfair and as a result, disproportionate.

[83] In the case of an offender who presents with cognitive challenges, and who is sentenced more than one year after the commission of the offence, the immediate link between consequence and cause may be lost, and as a result a sentence of imprisonment may not achieve the necessary deterrence.

[84] Reducing the over-incarceration of Aboriginal offenders is as important an objective as that of protecting vulnerable victims, and it must be given equal consideration.

[85] For all these reasons, I find that the mandatory minimum sentence of six months in jail is grossly disproportionate to the seriousness of the offence and the moral blameworthiness of the accused. As a result, then, I find that the accused's right to be protected against cruel and unusual treatment or punishment is infringed by the mandatory minimum punishment found at section 271(b) of the Criminal Code.

#### Is The Provision Saved By Section 1 Of The Charter?

[86] I endorse the view expressed by Gates, J. in *R. v. Esposito*, that the possible existence of valid effective alternatives to the mandatory minimum sentence is relevant to the analysis under section 1.<sup>68</sup> Such alternatives in the present case would include a conditional sentence order, and an intermittent sentence of imprisonment. Gates J. reviewed a number of decisions which, according to him, “confirm that Conditional Sentence Orders were imposed in a number of these types of cases prior to the introduction of mandatory minimum sentences”.<sup>69</sup>

[87] I note that the Crown has not presented evidence or arguments to justify the breach of s. 12 of the *Charter*. Although I may not declare section 271(b) *CC* to be of no force and effect, I may decline to impose the mandatory minimum

---

<sup>68</sup> op. cit. at par. 106

<sup>69</sup> op. cit. at par. 143

punishment. I find that the provision is not saved by section 1 of the *Charter*, and accordingly, I decline to impose the mandatory minimum punishment.

Is The MMP Grossly Disproportionate In Regard To Reasonable Hypotheticals?

[88] Given the finding I just made, I feel that I do not need to engage into the second part of the inquiry. However, if I am wrong about the first part of the inquiry, I would nevertheless come to the conclusion, based on the decisions of *R. v. Lafferty*, which I consider binding, and *R. v. R.A.* which I consider persuasive, that the mandatory minimum sentence of imprisonment found at s. 271(b) *CC* is contrary to section 12 of the *Charter* in relation to the reasonable hypotheticals which were considered in those cases.

**THE APPROPRIATE SENTENCE**

[89] For the reasons expressed above, I order that the accused serve a conditional sentence of imprisonment of 120 days, to be followed by a period of probation of eighteen months. The accused must provide a sample of his DNA pursuant to s. 487.051 *CC*. The victim fine surcharge does not apply in this case, due to the date of the offence. I turned my mind as to the need to impose a firearms prohibition order, and given the age of the accused, the absence of criminal conviction and the circumstances of the offences, I find that it is not mandated.

The accused must register under the *S.O.I.R.A.*, for a mandatory period of ten years.

DATED AT YELLOWKNIFE, NORTHWEST TERRITORIES, THIS 10<sup>TH</sup> DAY  
OF JULY 2020

---

CHRISTINE GAGNON, T.J.

APPENDIX A

ADDRESS TO THE ACCUSED

Mr. Kapolak, in March 2019, that is one year and four months ago, you met this girl on the street who was walking her dog. You knew her and you went to speak to her. She was 15 years old at the time. While it's "OK" to speak to a girl, what you did next was not "OK".

You started touching her on her body, and on her private parts. She did not like that and she did not want that. She told you that, and she wanted you to stop. But you did not stop until she was able to run away from you.

What you did to her is called a sexual assault and it is against the law. You were arrested by the police because you can't touch a person on their bum, or their breast, or between their legs if they don't want you to. Do you understand that?

You have to understand that, and you have to remember that, and not do it again, otherwise, you may go to jail.

Today, I am not going to send you to jail, but you will get a punishment for what you did last March 2019 to that girl. I wrote my decision explaining this and I gave a copy to your lawyer, and to the Crown prosecutor. I am not going to read it to you, but I am going to say this for the record (paragraphs 81-85):

Because the mandatory minimum sentence of imprisonment for six months applies to all offenders having committed any form of sexual assault on a victim aged anywhere between 1 day and 16 years, it is vulnerable to Charter scrutiny.

Imposing a sentence of six months in jail on this accused who is a first offender when there are many mitigating factors and when the circumstances of the offence, while being serious, are not too egregious, is fundamentally unfair and as a result, disproportionate.

In the case of an offender who presents with cognitive challenges, and who is sentenced more than one year after the commission of the offence, the immediate link between consequence and cause may be lost, and as a result a sentence of imprisonment may not achieve the necessary deterrence.

Reducing the over-incarceration of Aboriginal offenders is as important an objective as that of protecting vulnerable victims, and it must be given equal consideration.



For all these reasons, I find that the mandatory minimum sentence of six months in jail is grossly disproportionate to the seriousness of the offence and the moral blameworthiness of the accused. As a result, then, I find that the accused's right to be protected against cruel and unusual treatment or punishment is infringed by the mandatory minimum punishment found at section 271(b) of the Criminal Code.

Mr. Kapolak, stand up please. Balancing the statutory aggravating factors with the principle of proportionality, and giving the necessary consideration to s. 718(e) CC, taking in consideration your young age, your status as an Inuk, the absence of criminal record, the guilty plea, the diminished responsibility, and the fact that you complied with the conditions of your release order, I find that a conditional sentence of imprisonment for four months is appropriate, to be followed by a period of probation of eighteen months.

Mr. Kapolak, you must give a sample of your DNA. The victim fine surcharge does not apply in this case, due to the date of the offence. I turned my mind as to the need to impose a firearms prohibition order, and given the age of the accused, the absence of criminal conviction and the circumstances of the offences, I find that it is not mandated.

You must register under the *S.O.I.R.A.*, for a mandatory period of ten years. What I tell you today is my order, so listen closely.

## APPENDIX B

### CONDITIONS OF THE CONDITIONAL SENTENCE ORDER

- (a) Keep the peace and be of good behaviour.
- (b) Come to court when you are told.
- (c) Report to a conditional sentence supervisor today. This person works at the 2<sup>nd</sup> floor Centre Square Office Tower. Their name is:  
  
Mr./Ms. \_\_\_\_\_ will give you another appointment, and they will tell you if you need to come in person or if you call them on the phone. You can't miss any appointment. If you do, you may go to jail.
- (d) Stay in the NWT. You can only leave the NWT if Mr./Ms. \_\_\_\_\_ gives you permission, in writing, and before you leave.
- (e) Tell a judge in court or Mr. /Ms. if you plan to change your name, or go live in a new house.
- (f) Don't talk to, or call, or send messages to \_\_\_\_\_ and you can't go close to her, or go to her house.
- (g) Live with your mother, in her house, or at any house that your supervisor agrees to and follow your mother's rules.
- (h) Stay inside your house or on the balcony, or yard every day, and all day for the next 4 months.

You can only leave the house if:

- you have to go to the hospital, health clinic, or dentist
- you have an appointment with your supervisor
- you have the permission of your supervisor in writing, and you are with your mother
- your supervisor told you to go to a class, a program, or a treatment program that would help you.

(i) Go to a class, a program or a treatment program if your supervisor tells you to go. This can be a program about how to respect girls, or about things that you can't do or say to other people. It can be a program to help you learn new skills. It can also be a meeting with a psychologist like Ms Dean, or a therapist.

(j) Don't use drugs and don't drink alcohol.

(k) Help your mother with her chores in the home.

## APPENDIX C

### CONDITIONS OF THE PROBATION ORDER

1. Keep the peace and be of good behaviour.
2. Come to court when you are told.
3. Report to a probation officer on the last day of your Conditional Sentence Order. This person works at the 2<sup>nd</sup> floor Centre Square Office Tower. Their name is:  
  
Mr./Ms. \_\_\_\_\_ will give you another appointment, and they will tell you if you need to come in person or if you call them on the phone. You can't miss any appointment.
4. Tell a judge in court or Mr. /Ms. \_\_\_\_\_ if you plan to change your name, or to go live in a new house, or get a job.
5. Don't talk to or call, or send messages to Sherrina H. and you can't go close to her, or go to her house.
6. Live with your mother, in her house, or at any house that your probation officer agrees to and follow the house rules.
7. Be inside your home by 7:00 pm every day, and stay inside until 7:00 am the next day.
8. Continue to go to a class, a program or a treatment program if your supervisor tells you to go.
9. Help your mother with her chores in the home.

*R. v. Kapolak*, 2020 NWTTC 12

*Date: July 20, 2020*  
*File: T-1-CR-2019-001114*

---

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

---

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**- and -**

**MARLOWE KAPOLAK**

---

**REASONS FOR SENTENCE**  
**of the**  
**HONOURABLE CHIEF JUDGE**  
**CHRISTINE GAGNON**

---

<p>This decision is subject to a ban on publication pursuant to s. 486.4 of the Criminal Code with respect to the name of the victim as well as any information that would identify this person.</p>
--

[Section 271 of the *Criminal Code*]