PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Ward*, 2019 NSPC 72

Date: September 18, 2019
Docket: 8231546
Registry: Halifax

Between:

Her Majesty the Queen

v.

Matthew Russell Ward

Restriction on Publication: S. 486 – Identity of Victim

DECISION ON CONSTITUTIONAL QUESTION AND SENTENCE

Judge:	The Honourable Judge Amy Sakalauskas
Heard:	June 11, 2019 and September 3, 2019, in Halifax, Nova Scotia
Decision:	September 18, 2019
Charge	**Section 172.1(1)(b) of the Criminal Code**
Counsel:	Sylvia Domaradski, for the Crown Wayne Bacchus, for the Defence

BY THE COURT, ORALLY:

OVERVIEW

[1] Mr. Ward pleaded guilty to one count of Luring a child under 16 years of age, contrary to s. 172.1(1)(b) of the *Criminal Code*. The Crown proceeded summarily.

[2] Mr. Ward asserts that the mandatory minimum six-month jail sentence violates his Section 12 *Charter* rights to be free from cruel and unusual punishment. He seeks a suspended sentence with 2-3 years of probation, or alternatively, a 90-day Conditional Sentence Order followed by 2 years probation, and in the further alternative, a 60-day jail sentence, to be served intermittently. The Crown argues there is no *Charter* breach, and an appropriate sentence is custody in the 9 – 12-month range, followed by 18-24 months of probation.

[3] There are two steps in a sentencing involving a s. 12 challenge. On September 3, 2019, I confirmed that I would hear the s. 12 arguments, as I determined a fit and proper sentence for Mr. Ward is between 1 to 4 months institutional incarceration.

[4] The defence argued that I could rely on the Court of Appeal decision in ***R. v. Hood*, 2018 NSCA 18** ("*Hood*") to find a *Charter* breach, without conducting my own analysis. In finding the mandatory minimum to be constitutionally inoperative when this offence is prosecuted by way of indictment, the Court of Appeal considered a reasonable hypothetical. For this, the Court gave a range of sentence that would include a suspended sentence with probation or a brief period of incarceration. The law is clear, however, that I must conduct my own analysis. The law is also clear as to how this analysis is to proceed.

[5] I must first determine a fit and proper sentence for Mr. Ward, based on the purpose and principles of sentencing in the *Code*, as if there was no mandatory minimum. If I find the fit and proper sentence to be six months or more in jail, I can use my discretion and not consider s. 12 (***R. v. Lloyd*, 2016 SCC 13** ("*Lloyd*")). As noted in *Lloyd*, if I find that the mandatory minimum does not materially exceed the bottom of the applicable sentencing range, I can decline to consider the constitutional issue. Provincial Court judges have no power to make formal declarations that a law is of no force or effect under the *Constitution Act* but can choose not to apply it in a given sentencing before them. It would not be a good use of Court resources to conduct a constitutional analysis that has no impact on Mr. Ward's sentence. The range I determined for this offence and this offender is

below the mandatory minimum. I therefore invited further submissions on the *Charter* issue.

THE OFFENCE

[6] The Victim Impact Statement is not detailed, but it paints a picture of a youth who has been seriously impacted by Mr. Ward's actions. The agreed facts were read into the record:

- The victim is M.W., born in May 2003. She is 16 years old now and was 14 years old at the time of the offence.

- On September 7, 2017, M. W. received a message in her Facebook account from another Facebook account with the profile name of Alex Cross. They continued to message each other until September 10, 2017. The messages were located on M.W.'s iPad and brought to the police. The messages are an Exhibit before the Court and I will discuss them in more detail shortly.

- On or about September 14, 2017, M.W.'s mother discovered the messages and contacted the local police.

- Around September 15, 2017, the police obtained a "consent to Assume Online Presence" form and attempted to send Alex Cross a message through Facebook, but it came back and being blocked.

- Mr. Ward was arrested on May 2, 2018.

- Various devices were seized from Mr. Ward's residence pursuant to a search order. Evidence corroborating the chat between Mr. Ward and M.W. were located on 2 of his devices.

[7] Mr. Ward did not know M.W. but sent her a friend request on Facebook Messenger out of the blue. He assumed a false name. He told her he was 30 years old. His fifth message to her suggested he buy her liquor. By this time, he had confirmed that she was in grade 9. He suggested they hang sometimes and offered to supply her with alcohol of her choice so they could drink together. He was clearly the leader in the conversation, turning it to questions about her curfew. He suggested she sneak out when her parents were asleep, more than once. He called her "cute stuff" and repeatedly asked her to meet with him. He said he could get a hotel room and asked if she could spend the night. He said she was beautiful and said he wanted to make out with her, eventually turning the discussion to wanting to have unprotected sex with her. He asked her for a picture and received a selfie. He suggested meeting her for sex in a hotel room, his car, or her house, all during different conversations. She always declined.

LEGAL FRAMEWORK

[8] As explained, I must first determine a fit and proper sentence for Mr. Ward, as if there was no mandatory minimum. Then, in considering the constitutional issue, I ask whether the mandatory minimum would be grossly disproportionate if applied to Mr. Ward. It is Mr. Ward's onus to prove the *Charter* breach on a

balance of probabilities, and it is a high bar. This is because our *Charter* affords deference to Parliament on issues of statute.

[9] In determining the range of sentence, I am to apply the purpose and principles of sentencing outlined in s. 718 – 718.2 of the *Code*. As noted by Judge Ross in ***R. v. S.J.P.*, 2016 NSPC 50**, "At this stage the potentially *binding* effect of the MMP [mandatory minimum punishment] is put aside, but Parliament's pronouncement on the seriousness of the conduct is not completely ignored".

[10] Justice Karakatsanis recently set out the procedure for determining whether a provision of the *Code* violates s.12 of the *Charter* in ***R. v. Morrison*, 2019 SCC 15** ("*Morrison*")*:*

> [164] Section 12 of the Charter states that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment." In order to qualify as "cruel and unusual" punishment, a mandatory minimum sentence must be grossly disproportionate (R. v. Lloyd, 2016 SCC 13 (CanLII), [2016] 1 S.C.R. 130, at paras. 22-23; R. v. Smith (Edward Dewey), 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, at pp. 1072-73).
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> [165] The standard of gross disproportionality is a high bar. A grossly disproportionate sentence must be more than merely excessive. It must be so excessive as to outrage our society's standards of decency and must be disproportionate to the extent that Canadians would find it abhorrent or intolerable (Smith, at p. 1072; R. v. Morrisey, 2000 SCC 39 (CanLII), [2000] 2 S.C.R. 90, at para. 26; R. v. Ferguson, 2008 SCC 6 (CanLII), [2008] 1 S.C.R. 96, at para. 14).
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> [166] To determine whether a mandatory minimum sentence imposes a grossly disproportionate punishment, the court engages in a comparative exercise. This involves comparing the mandatory minimum sentence for the relevant offence to the fit and proportionate sentence that would otherwise be mandated by the sentencing principles

> found in the Criminal Code. Ultimately, if the mandatory minimum forces courts to impose a sentence that is grossly disproportionate to the otherwise fit and proportionate sentence, then the mandatory minimum is inconsistent with s. 12 (Lloyd, at para. 23).

[11] Justice Karakatsanis specifically discussed the luring offence:

> [182] As outlined above, s. 172.1(1) captures a wide variety of communications. .... Finally, the communication can actually be with an underage child or, as in this case, with a police officer posing as one (see *R. v. Rafiq*, 2015 ONCA 768 (CanLII), 342 O.A.C. 193, at paras. 47-49). These factors may impact the level of harm caused by the offence, thereby informing what constitutes a fit and proportionate sentence (see s. 718 of the *Criminal Code*).
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> [183] The personal circumstances of the offender and the relationship between the offender and the victim may also vary significantly. Past cases demonstrate that child luring offences are sometimes committed by individuals who .... were themselves abused in the past (see e.g. *R. v. Hood*, 2018 NSCA 18 (CanLII), 409 C.R.R. (2d) 70; *R. v. S. (S.)*, 2014 ONCJ 184 (CanLII), 307 C.R.R. (2d) 147; *R. v. Crant*, 2017 ONCJ 192 (CanLII)). These factors may diminish the moral blameworthiness associated with the offence (see s. 718.1 of the *Criminal Code*).
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> [184] Given the variety of circumstances captured by the offence, it is not surprising that the s. 172.1(1) jurisprudence demonstrates that the fit and proportionate sentence can be significantly less than the one-year mandatory minimum term of imprisonment required by the *Criminal Code*. Courts applying the *Criminal Code*'s sentencing principles have determined that, in certain child luring cases, a fit and proportionate sanction included lesser penalties: a short period of institutional incarceration of 90 days or less (*Alicandro*, at paras. 2 and 49; *R. v. Read*, 2008 ONCJ 732 (CanLII) at para. 29; see also *R. v. Dehesh*, [2010] O.J. No. 2817 (S.C.J.), at para. 9; S. (S.), at para. 91); a conditional sentence (*R. v. El- Jamel*, 2010 ONCA 575 (CanLII), 261 C.C.C. (3d) 293, at paras. 2 and 20; *R. v. Folino*, 2005 CanLII 40543 (ON CA), 2005 ONCA 258, 77 O.R. (3d) 641, at para. 33; R. v. B. and S., 2014 BCPC 94, at para. 42 (CanLII); *R. v. Danielson*, 2013 ABPC 26, at para. 89 (CanLII)); or even a conditional discharge (*R. v. Pelletier*, 2013 QCCQ 10486 at para. 73 (CanLII)). Although some of these cases (*Dehesh; S. (S.); Danielson*) proceeded by way of summary conviction, they demonstrate that the offence can warrant such sentences. And, as the Nova Scotia Court of Appeal recently noted, in certain reasonably foreseeable cases, a suspended sentence would be appropriate (*Hood*, at para. 154).

[12] These comments are in keeping with the general comments of the Majority decision in *Lloyd* (at 35), that mandatory minimums that apply to offences that can

be committed in a wide variety of ways, under a broad array of circumstances, are vulnerable to constitutional challenge. This is because they will inevitably include an acceptable reasonable hypothetical for which the mandatory minimum punishment will be unconstitutional.

[13] As the Supreme Court of Canada confirmed in ***R. v. Nur*, 2015 SCC 15** ("*Nur*"), a reasonable hypothetical is a situation that may be expected to arise. It is not "marginally imaginable", not "far-fetched", but "reasonable". The Court looks at how the law might impact third parties in reasonably foreseeable situations. It looks at what circumstances are foreseeably captured by the minimum conduct caught by the offence. The threshold is not what is common or likely.

[14] Section 718 of the Criminal Code explains the fundamental purpose and fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions. It states that sentences should attempt to do one or more the following: denunciation, deterrence, separation from society where necessary, rehabilitation, reparations to victims/community, promote a sense of responsibility and acknowledge harm done to victims/community.

[15] Section 718.1 states that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. ***R. v. Nasogaluak,* 2010 SCC 6** reminds us that a sentence must not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. Judges are to take an individualized approach and use their broad discretion to formulate an appropriate sentence.

[16] Section 718.2 states the other principles that the sentencing court is mandated to take into consideration, including consideration of aggravating and mitigating factors, parity, offenders should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.

[17] Section 718(2)(e) mandates that all available sanctions or options other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[18] Section 718.01 of the *Code* specifies that deterrence and denunciation are to be given primary consideration, as this is an offence involving a person under

the age of 18 years. In addition, the abuse of a person under age 18 is a statutorily aggravating factor under s. 718.2(ii.1).

LURING

[19] The offence of Luring was created in 2002. Until 2012, it did not have a mandatory minimum sentence. In 2012, *The Safe Streets and Communities Act* brought in a mandatory minimum sentence of 90 days where the Crown proceeded by summary conviction. In 2015, the *Tougher Penalties for Child Predators Act* increased this minimum to 6 months.

[20] The caselaw is replete with references to the purpose of the section, being to protect vulnerable young people from online predators who lurk in anonymity and prey of their naive approach, curiosity, and overall vulnerability when it comes to communication by device. This brings abusers and would-be abusers into the private homes of families struggling with the new world of online activities of children and youth. Luring is a crime meant to stop the hands on offending it steps up to, after gaining online trust by way of manipulation and exploitation of children who are especially susceptible to it, and in many cases, desensitized to the dangerous side of online life. It is undisputed that the Courts needs to take the

crime of luring very seriously given this underlying social policy and the harm it is meant to protect against.

[21] As noted in ***R. v. Harris*, 2017 ONSC 940**:

> [1] The internet is ubiquitous in today's society. It fosters convenience, sociability, commerce, and the flow of information. But it also has a dark side. The internet can serve as a hunting ground for sexual predators who seek to befriend young persons and groom them for sexual activity. Children are vulnerable targets and can be manipulated by persons who conceal their true intentions and/or identity online. Communications with predators are harmful in and of themselves; they can also serve as a gateway to the commission of sexual offences. In recognition of this pernicious danger, Parliament created the offence commonly known as "luring"…

[22] A review of luring cases shows the high number of times the offender is otherwise without a criminal history. In this sense, it can be likened to the situation of impaired driving that the Supreme Court of Canada discussed in ***R. v. Lacasse*, 2015 SCC 64**. Although the offences are very different, deterrence and denunciation are at the forefront when sentencing impaired drivers, who also face mandatory minimum sentences. The Court wrote:

> [73] While it is true that the objectives of deterrence and denunciation apply in most cases, they are particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who will be sensitive to harsh sentences. Impaired driving offences are an obvious example of this type of offence, as this Court noted in *Proulx*:
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> > . . . dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties: see *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.), at p. 150; *R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344 (Ont. C.A.), at

> paras. 18-24; *R. v. Blakeley* (1998), 40 O.R. (3d) 541 (C.A.), at pp. 542-43. [para. 129]

MR. WARD'S CIRCUMSTANCES

[23] Shari Rioux, a New Brunswick Probation officer, prepared a Pre-Sentence Report dated May 21, 2019. Mr. Ward is 39 years of age and was 37 (almost 38) at the time of the offence. He enjoyed a positive upbringing and has the continued support of his parents. He has been working full time for the Province of New Brunswick since November 2018 in a position linked to his post-secondary education. He suffered from depression and anxiety in the past and is medicated for anxiety. Mr. Ward has no criminal record.

[24] Mr. Ward has been seeing Dr. Brad Kelln, psychologist, since May 2018, and as of the time of Dr. Kelln's report of February 19, 2019, they were meeting every six weeks. Dr. Kelln provided testimony at the sentencing hearing. He explained that Mr. Ward first contacted him for therapy and not the primary purpose of a risk assessment. He later conducted a risk assessment and found that Mr. Ward is a low risk to re-offend. He said it was on the very low end of the scale, compared to others charged with sexual offences. He said that Mr. Ward had developed maladaptive coping practices, using online chatting as an escape mechanism, for example when stressed. This would trigger a neurological process,

teaching his brain to use this and need it. The resultant dopamine would lend a sense of euphoria, and he stopped looking for other coping mechanisms. Over time, he started doing it when not stressed.

[25] Dr. Kelln said right now it is difficult to continue treatment given the microscope of the Court proceeding, but once that is lifted, he envisioned another year or so of treatment. Given Mr. Ward's openness to date, he was very optimistic about his treatment. He said whether it was hands on offending or the Internet, Mr. Ward's risk of re-offending remains low. He now has healthy coping mechanisms. He has developed insight into his behaviors and cycles and has been working to break them. He said that Mr. Ward recognizes that he was on a road to actual hands-on offending and knows he must be diligent to avoid this trajectory.

[26] In addressing the Court, Mr. Ward apologized to the victim and her family, and said he was ashamed and disgusted by what he did. He explained that he was going through a dark time given his personal circumstances and suffering from depression and anxiety and is thankful for the support he has since received.

[27] Mr. Ward has had his release on these matters by way of an Undertaking. He is to stay away from playgrounds and community centres while children are

present during the day and is not permitted to use the Internet except for work and LinkedIn. He cannot be around children under age 16, unless their parent is present. He has not been subject to any curfew or house arrest.

SENTENCING RANGE

[28] The Crown says the range is 9-12 months incarceration, followed 18-24 months probation. They provided the following cases:

- *R. v. Thakre*, 2018 CarswellOnt 5028 ("*Thakre*")
- *R. v. A.H.*, 2018 ONCA 677 ("*A.H.*")
- *R. v. Gucciardi*, 2017 ONCJ 770 ("*Gucciardi*")
- *R. v. Jaffer*, 2018 ONCJ 1271 ("*Jaffer*")
- *R. v. Harris*, 2017 ONSC 940 ("*Harris*")

[29] In ***Thakre***, a 57-year-old with no criminal record pleaded guilty to communications with a police officer posing as a 14-year-old, over 4 weeks. The communications involved explicit pics and he was arrested when he attended a planned meeting. He was clearly committed to sex with the perceived teenager and was grooming her for this. He was a low risk to re-offend, pro-social, and involved in sex offender treatment. He was sentenced to 12 months custody, followed by 2 years probation.

[30] In ***A. H.,*** a first-time offender sent messages to a friend of his 15-year-old children, which the judge deemed akin to a fiduciary relationship. The messages were described as "abhorrent", were over a two-month period, and included graphic images. The sentence was 15 months custody followed by 1-year probation.

[31] In ***Hood***, which I will discuss in more detail shortly, the Court struck down the mandatory minimum sentence of one year in jail for this offence when it is by way of indictment, based on reasonable hypotheticals. For Ms. Hood, they upheld the sentence of a 15-month Conditional Sentence Order. She was a teacher who was convicted of 2 counts of luring, invitation to sexual touching, and touching for a sexual purpose, in relation to two former students to whom she was in a position of trust. The offences were very serious, with a high level of planning, and took place over a period of months.

[32] In ***Gucciardi***, a 60-year-old offender pleaded guilty to communicating with a police officer posing as a 14-year-old girl. He was arrested at the meeting place. His clear aim was sex, for which he groomed, and his messages included illicit video. He had engaged in sex offender therapy. He was sentenced to 12 months, followed by 3 years probation.

[33] In ***Jaffer***, a 22-year-old first time offender pleaded guilty to responding to the online ad of someone he thought was 15-year-old but who was a police officer. He was arrested when he attended the planned meeting. He had a supportive family, depression and anxiety, was on the autism spectrum, and deemed a low risk to re-offend. He was sentenced to 6 months and 18 months probation.

[34] In ***Harris***, a 57-year-old first time offender was found guilty after trial. He posted online ads looking for a young girl for sex, and a police officer responded. He was arrested at the meeting place, after explicit communications involving grooming. He was sentenced to 18 months custody, followed by 3 years probation.

[35] I agree with the defence that the Crown has primarily provided cases that reveal more aggravating circumstances than that of Mr. Ward, including the length and nature of the communications, as well as the following through to meeting places. The Crown does recognize this somewhat with their suggested starting range of 9 months. Luring is a broad offence and catches a great variety of situations, making such comparisons even more complicated. The Crown notes what they see as an important feature here, being the involvement of a real teenager, as opposed to an undercover police officer. The caselaw is clear that this can impact sentence, as it can cause more harm to victims and the community if a

real youth is involved. The Crown focuses on deterrence and denunciation, and while recognizing Mr. Ward's rehabilitative potential, they say it does not outweigh the need for their suggested jail sentence.

[36] The Defence argues that the range is from a suspended sentence with probation to a short custodial term and provided the following cases:

- *R. v. Randall*, 2018 ONCJ 470 ("*Randall (2018)")*
- *R. v. P. (M. G.*), 2015 SKPC 80 ("*P. (M.G.*)")
- *R. v. Mermer*, 2015 ONSC 2715 ("*Mermer*")
- *R. v. M.C.*, 2016 CarswellNfld 2 ("*M.C.*")
- *R. v. Parr*, 2012 ONCJ 406 ("*Parr*")
- *R. v. Arrojado*, 2009 ONCJ 499 ("*Arrojado*")
- *R. v. Dominaux*, 2017 CarswellNfld 11 ("*Dominaux*")
- *R. v. Randall*, 2006 NSPC 38 ("*Randall (2006*)")
- *R. v. Shaw*, 2018 BCPC 77 ("*Shaw"*)
- *R. v. Thaiyagarajah*, 2012 ONCJ 282 ("*Thaiyagarajah*")

[37] In ***Randall (2018),*** a 50-year-old offender with no criminal record pleaded guilty to luring and was sentenced to 90 days, intermittent, and 3 years Probation. He had posted an ad online for "girls of any age" and communicated with an undercover police officer posing as a 15-year-old over 48 hours, during which he sent explicit texts and videos. He was arrested when he attended a planned meeting, to which he brought a backpack with sadomasochism gear, in keeping

with the nature of the explicit communications. He was given a 90-day intermittent sentence, followed by 3 years probation, after having served 7 days on remand.

[38] In. ***P. (M.G.),*** a 58-year-old Canadian Forces member pleaded guilty to luring while at work and on his work computer. He had no criminal record and was deemed a low risk to re-offend. He pretended to be a teenager and used a photo of his teenaged daughter to further this representation. He chatted for hours with a person under age 16, during which he encouraged her to have sex with her 12-year-old cousin and do other things of a sexual nature. He was seeking Mental health assistance. He was sentenced to four months in jail, followed by 12 months probation.

[39] In ***Mermer***, a 35-year-old offender with no criminal record communicated with a police officer posing as a 14-year-old over a two-month period. He arranged a meeting with her and was arrested when he attended. There was grooming and the trial judge found he had limited insight. This resulted in a sentence of 8 months custody on summary conviction appeal.

[40] In ***M.C.,*** a 39-year-old man with two youth sexual assault convictions pleaded guilty to luring, by way of a lengthy period of communications with a 14-15-year-old. He himself had been sexually abused as a child. Despite the guilty plea, he did not accept responsibility for his actions, he used the girl's mother to arrange a meeting with her in which he denied sending the messages, and then started dating the mother. He was sentenced to 9 months in custody and 2 years probation.

[41] In ***Parr***, a 59-year-old first time offender pleaded guilty to luring, after communicating with a police officer posing as a 12-year-old. There were 13 communications over 3.5 months, during which he exposed his genitals. He had support and employment and was a low risk to re-offend. He spent 21 months on very restrictive house arrest, and was sentenced to 8 months custody, followed by 3 years probation.

[42] In ***Arrojado***, a 31-year-old offender with no criminal record pleaded guilty to having 5 chats with a police officer posing as a 13-year-old over a one-week period. He offered money in return for sex acts, sent pornography and explicit pictures of himself, and set up a meeting that he did not attend. He was employed

with a supportive family but minimized his offence. He was sentenced to 8 months custody and 3 years probation.

[43] In ***Dominaux***, a 26-year-old first time offender pleaded guilty to luring a 14-year-old victim, with an abundance of texts and skype messages, including those with explicit images of the offender, and which resulted in 11 in-person meetings during which sexual activity took place. For the luring, the offender was sentenced to 11 months in custody.

[44] In ***Randall (2006)***, the offender communicated with a police officer posing as a 14-year-old and attended a planned meeting. He did not accept responsibility for the offence, and was sentenced, by way of a joint recommendation, to a one-year Conditional Sentence Order.

[45] In ***Shaw***, a 33-year-old pleaded guilty to luring a 13-14-year-old over a long period, during which pictures were exchanged. He had been held on strict bail conditions. He had a serious brain tumor, along with family support, but had targeted a vulnerable youth and did not accept responsibility for his actions. He was sentenced to 14 months, followed by 3 years probation.

[46] In ***Thaiyagarajah***, the offender pleaded guilty. He communicated with a police officer posing as a 14-year-old. He attended an arranged meeting for sex and was arrested. The offender did not fully accept responsibility. He was sentenced to an 18-month Conditional Sentence Order, with electronic monitoring.

[47] The defence provided me with one case in which a suspended sentence was provided for luring. It is ***R. v. MacKenzie*, [2005] O.J. No. 1146,** which is essentially one paragraph in which the judge accepted a joint recommendation for a suspended sentence and one-year probation. It says nothing about the offender nor the offence.

[48] I have also considered the following cases:

- *R. v. King*, 2019 ONCJ 366 ("*King*")
- *R. v. Fawcett, 2019 BCPC 125* (*Fawcett*")
- *R. v. Koenig*, 2019 BCPC 83
- *R. v. B.S.*, 2018 BCSC 2044 ("*B.S*")
- R. v. Hathaway, 2018 BCPC 342
- *R. v. Ly*, 2019 ONCJ 120
- *R. v. Kron*, 2018 ONCJ 622 ("*Kron*")
- *R. v. Reynard*, 2015 BCCA 455 ("*Reynard*")
- *R. v. Stewart*, 2013 NSPC 64 ("*Stewart*")
- *R. v. Blinn*, 2018 CarswellNS 878 ("*Blinn*")
- *R. v. Duplessis*, 2018 ONCJ 912

- *R. v. Hathaway*, 2018 BCPC 342
- *R. v. Bell*, 2018 BCPC 187

[49] ***King*** was released on May 29, 2019. Mr. King pleaded guilty to luring a person under age 16 and the Crown proceeded summarily. An undercover police officer was maintaining an online account posing as a 14- year old girl. Mr. King initiated frequent and explicit online conversations with the girl over months. He instructed her in masturbation and arranged to meet for sex. He was arrested at the meeting place, to which he had driven over 200 kms and brought items to be used for sex. Mr. King suffered a horrific childhood, was a 51-year-old first time offender with supports and a pro-social history. He was engaged in therapy and assessed as a low risk to re-offend. The judge found that a six-month sentence would be grossly disproportionate and refused to apply it, instead imposing a 12-month CSO to be followed by Probation.

[50] ***Fawcett*** was released on June 18, 2019. The offender pleaded guilty to one count of luring, involving sexually explicit texts with an imaginary person he believed was 12 years old. The texts were many, persistent, and included an attempt to meet. Mr. Fawcett had a developmental disability, extremely low IQ, social limitations that the judge found reduced his moral blameworthiness. The judge also noted that he was induced into committing an offence that otherwise did

not occur to him, from vigilante Creep Catchers. The judge found the proper sentence to be a six-month Conditional Sentence Order, followed by 2 years probation. She refused to apply the mandatory minimum, emphasizing that a Conditional Sentence Order is normally longer than sentences served in jail. The judge stated that the six-month jail term was grossly disproportionate to a six-month CSO and refused to apply the mandatory minimum.

[51] In ***Kron***, the 25-year-old offender convinced 6 girls aged 12-14 years to provide him with intimate images over several months, sharing some of the images in the process. He also sent intimate images of himself to them. The impact on some victims with traumatic. He pleaded guilty to four counts of luring, one count of voyeurism, and one count of possessing child pornography. He had no criminal record, expressed remorse, had employment and followed strict bail conditions. He participated in treatment and had good rehabilitative prospects and family support. He was assessed as a low risk to reoffend. The judge imposed a sentence of six months (concurrent on each count), followed by 3 years probation.

[52] ***B.S***. was a luring case in which the electronic communications had no sexual content. There were 100 texts over a four-month period, the girl rarely responded, and the accused frequently referred to her as “babe”. The Aboriginal accused

persisted in trying to get a teenaged relative to his home, unsuccessfully, and the judge found the communications met the elements of the offence, albeit on the lower level in content. The complainant was also the victim of sexual interference by the offender. The judge found that the mandatory minimum sentence of 12 months for communications with no sexual content would be grossly disproportionate and that a six-month sentence was appropriate.

[53] In ***Reynard***, *the British Columbia Court of Appeal* upheld a one-year luring sentence for a 41-year-old offender with a related UK record. He chatted with 10 complainants he believed were under age 16, asked some to send him nude pictures and/or touch themselves in a sexual way, he disseminated the pictures of one of them, he also sent some explicit video of himself. The Appeal Court noted that the trial judge's sentence decision was lenient in the circumstances.

[54] In ***Stewart***, Judge Attwood granted a 3-year sentence for luring, having reduced it from 5 years based on totality given the numerous serious offences involved in the sentencing. The decision was appealed on the issue of remand credit, but there was no sentence appeal.

[55] In ***Blinn***, Judge Landry sentenced a 38-year-old first time offender who pleaded guilty to several offences, including one count of luring, by indictment. This was after *Hood*, so there was no mandatory minimum. A sex offender assessment was generally positive, and the accused had abided by bail conditions for 33 months. The victims were very young, and Mr. Blinn was found to have been in a position of trust. Judge Landry sentenced him to 3 months for each offence, to be served consecutively, followed by 3 years probation. The offences involved 3 victims, and were luring, invitation to sexual touching, and sexual assault (2 counts).

[56] The decision in ***Hood*** is relevant to my determination of a range for Mr. Ward. In *Hood*, the Court considered a range of sentence for a hypothetical, noting it could start at a suspended sentence. The hypothetical in *Hood* was a first-year high school teacher in her late 20s with no criminal record, with the same mental health challenges as Ms. Hood, sending sexual texts to a 15-year-old student while feeling manic. They meet once and fondle each other. She pleads guilty and is remorseful. Of this, our Court of Appeal said:

> 154 Turning to step one, it is unlikely that any of these hypothetical crimes would even draw jail time. Instead, based on our judicial experience, we would expect to see a suspended sentence with a term of probation (with strict conditions) or at most, a brief period of incarceration and probation (also with strict conditions). . .

This asserted range for a reasonable hypothetical very recently received the endorsement of Justice Karakatsanis in her concurring reasons in *Morrison*.

[57] I agree with the Crown that Mr. Ward is not presenting as Ms. Hood presented, which takes him out of the situation considered in the Court of Appeal's hypothetical. The degree of mental health concerns he expresses are not as serious. He was well older than his teenaged victim. This was a calculated act and his moral blameworthiness is high.

[58] The defence characterizes Mr. Ward's actions as at the low end for this offence and called it "the least egregious situation you can think of". Mr. Ward is solely responsible his actions. He targeted a teenager who was a stranger to him and was the instigator of all communication. Sexually explicit communication. Communication encouraging her to meet with him, communication that requested and received pictures of the victim (although not explicit). This is not the least egregious situation for this offence. It is also not the most egregious, with a multitude of cases revealing much more aggravating situations. That being said, I cannot find a suspended sentence within the range. This offence requires a period of incarceration, as evident from the many decisions before me.

[59] At the same time, the Crown's submitted range is too high. There was no position of trust and the communications were relatively brief, over a few days. There was no planned meeting, although Mr. Ward proposed one. There were no explicit pictures exchanged, although there was that opening given Mr. Ward's request. Mr. Ward ended the communications.

[60] There are **mitigating factors** here, including Mr. Ward's guilty plea and remorse. He has family and community support. He has engaged in services, is making progress, and is deemed a low risk to re-offend. He is a first-time offender, and these communications were brief, before he ended them.

[61] **Aggravating factors** include the young age of the victim. And, the circumstances. Mr. Ward specifically targeted a person he knew was underage. He was predatory. He was insistent and persistent. He continued his sexual communications with her upon confirming that she was in grade 9. He tried to arrange a meeting with her multiple times, for unprotected sex, and repeatedly offered to supply her with alcohol. He told her she probably wouldn't get pregnant. He assumed a fake online persona. He asked her for a photo.

[62] Mr. Ward is a good prospect for rehabilitation, as shown by his work with Dr. Kelln and his pro-social life since his arrest. This offence needs deterrence and denunciation. Jail time is appropriate. This is in keeping with the jurisprudence and society's goals in prosecuting this offence in a rapidly expanding online world. I find that an appropriate range of sentence for this offence (and unlike the more aggravating ones) is between 1 to 4 months institutional incarceration along with a period of probation. Absent a mandatory minimum, I would sentence Mr. Ward to 3 months in jail, to be served intermittently, which would allow him to continue working and continue his rehabilitation, while also achieving deterrence and denunciation.

[63] Absent a mandatory minimum, a Conditional Sentence would be available, but I would not grant one in Mr. Ward's circumstances. While I do not find he is a danger to society and accept Dr. Kelln's position on that, a Conditional Sentence Order would be contrary to the purpose and principles of sentencing.

SECTION 12

Is the mandatory minimum sentence grossly disproportionate for Mr. Ward?

[64] I must consider whether the mandatory minimum punishment is grossly disproportionate to the sentence that is appropriate, having regard to the nature of the offence and the circumstances of the offender" (*Nur, Smith, Lloyd*). The wider the range of conduct and circumstances caught by the mandatory minimum, the more likely it is that it will apply to offenders for whom the sentence would be grossly disproportionate (*Lloyd* at paragraphs 3, 24, 35; *Morrison at* paragraphs 146-148).

[65] The test of gross disproportionality was articulated in ***R. v. Smith*, [1987] 1 S.C.R. 1045** and clarified in cases such as ***R. v. Goltz*, [1991] 3 S.C.R. 485**, ***R. v. Morrisey*, 2000 SCC 39** and ***R. v. Latimer*, 2001 SCC 1**. It requires examining and weighing several factors:

- The gravity of the offence;
- The personal characteristics of the offender;
- The circumstances of the offence;
- The effect of the sentence on the offender and other claimants;
- Whether the punishment is necessary to achieve a valid penal purpose (Is Parliament responding to a pressing problem?);
- Whether the punishment is founded on recognized sentencing principles;
- Whether valid alternatives to the punishment exist;
- Comparison with punishments for other crimes within the jurisdiction to determine proportionality, and
- Comparison with punishments for similar crimes in other jurisdictions.

[66] In considering the gravity of the offence, I consider the character of Mr. Ward's actions, and the consequences of them. The Victim Impact Statement indicates that this teenager has suffered an emotional impact ranging from insecurity to serious mental health issues, and an impact on her day-to-day activities and relationships. These are serious consequences. Mr. Ward knowingly broke the law when he targeted this youth for his messages and for his gratification. He is solely to blame for stepping well outside of our collective social values and causing such harm.

[67] I reviewed Mr. Ward's circumstances these when I determined my range of sentence. Mr. Ward has notable mitigating factors.

[68] As for the effect of the mandatory minimum punishment, Mr. Ward has never been to jail. Jail would have a significant impact on him. He is employed full time in his field full time. Without a doubt, the sentence would have a great impact on him.

[69] In considering the penological goals and sentencing principles, I recognize that Parliament created the luring offence in response to a pressing social problem. Is Parliament's approach to this consistent with proportionality? As the Supreme Court of Canada confirmed in *Morrisey*, proportionality is the essence of a s. 12 analysis. It needs to be considered, along with all our sentencing principles. There

is a strong need for deterrence and denunciation with this offence. Crimes against children, and especially sexual crimes against children, run contrary to our society's core values. There is no shortage of reported decisions on this offence in which a sentence less than six months in custody has been provided, even after the mandatory minimums were in play. It is important to remember that unfit sentences are upheld constitutionally, unless they are gross disproportionate.

[70] When I balance these factors on the circumstances before me, and considering my review of the applicable caselaw, I find that a mandatory minimum of 6 months incarceration in would be grossly disproportionate for Mr. Ward, being cruel and unusual in his circumstances. There are other valid options, as there were in many of the sentencing decisions I reviewed.

Is the mandatory minimum sentence grossly disproportionate in a reasonable hypothetical?

[71] If I am wrong in relation to Mr. Ward, the mandatory minimum penalty still fails on the analysis of a reasonable hypothetical.

[72] The defence proposed the reasonable hypothetical used by the Nova Scotia Court of Appeal in *Hood***:**

> 150 For example, consider a first-year high school teacher in her late 20s with no criminal record. She suffers from the same mental health challenges as Ms. Hood. One evening, she texts her 15-year-old student ostensibly to inquire about a school assignment. Feeling manic, she directs the conversation from casual to sexual. They agree to meet that same evening in a private location where they fondle each other. That was their one and only sexual encounter. Consider further a guilty plea, coupled with the teacher's sincere remorse.

[73] The *Hood* hypothetical was proposed to cover multiple offences. Ours need only be the texting that turns sexual and the teacher proposing she and the student have sexual contact. No meeting and mitigating factors such as those for Mr. Ward.

[74] The same reasonable hypothetical could involve a first-time offender who is an acquaintance of a 15-year-old and having the same texting communication. There is no breach of trust. This is not far-fetched, nor marginally possible. It is a reasonable hypothetical. The mandatory minimum sentence of 6 months would be grossly disproportionate for such an offender, in either version of that variation on the *Hood* scenario. A sentence could include a suspended sentence and probation with strict conditions, or a short period of custody and probation with strict conditions. Six months in jail would constitute cruel and unusual punishment.

[75] Mr. Ward has proven that the mandatory minimum sentence violates s. 12 of the *Charter*.

SECTION 1

[76] I have heard no arguments on Section 1 and whether it saves this section as per the test in ***R. v. Oakes,* [1986] 1 SCR 103**. Making such an argument would be a very difficult task. As the Nova Scotia Court of Appeal explained in *Hood* (at 155*)*, "It would be very difficult to rescue a provision that metes out punishment that is grossly disproportionate to a crime". The Appeal Court cited its decision in ***R. v. MacDonald,* 2014 NSCA 104** to say it would be looking to justify the unjustifiable.

[77I I find that the mandatory minimum sentence of 6 months for this offence is not a reasonable limit justifiable in a free and democratic society. I decline to impose it on Mr. Ward.

DECISION ON SENTENCE

[78] The mandatory minimum violates s. 12 of the *Charter*, both when applied to Mr. Ward and when applied to reasonable hypotheticals. As such, I will not apply it to Mr. Ward's sentencing. Applying the s. 24(1) *Charter* remedy, considering what is appropriate and just in the circumstances, I am sentencing Mr. Ward to 3

months in custody, to be served intermittently, starting this Friday, reporting at 8:00 p.m. until Sundays at 7 p.m.

[79] I also grant the mandatory DNA Order, a 10-year SOIRA Order, and a Forfeiture Order for the two seized devices that contained evidence of the communications. The Crown explained that they have not asked for a s. 161 prohibition order, saying those issues can be addressed in the Probation Order. Mr. Ward will be subject to probation for two years.

Amy Sakalauskas, JPC