Citation: *R. v. Tanguay-Dion,* 2025 YKTC 11

Date: 20250402
Docket: 24-11002
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

GASTON TANGUAY-DION

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Kathryn Laurie — Counsel for the Crown
Amy Steele — Counsel for the Defence

REASONS FOR SENTENCE

[1] Gaston Tanguay-Dion is before the Court for sentencing having entered a guilty plea to a single count of sexual assault contrary to s. 271 of the *Criminal Code*.

[2] This matter was originally before the Court for sentencing on January 17, 2025, on which date an admissions document was filed and there was a finding of guilt made. Counsel proceeded to advise the Court that the matter would proceed by way of a joint submission for a 90-day conditional sentence followed by a six-month probation order. The jointly proposed conditions for the conditional sentence and probation period are filed with the Court and have very minimal terms.

[3] Counsel were immediately advised of the Court's concern with the proposed sentence, being that it was substantially below the accepted range of sentence in this jurisdiction, and the matter was adjourned to February 28, 2025, to address the circumstances of the joint submission and the proposed sentence.

[4] This decision will address the following:

1. Facts of the Offence;
2. Basis for Concern About the Proposed Sentence;
3. Approach to Joint Submissions;
4. Crown and Defence Justification of Joint Submission;
5. Case law Relied on by Counsel;
6. Additional Cases helpful to the Court;
7. Considerations in Sentencing Mx. Tanguay-Dion; and
8. Appropriateness of a Conditional Sentence.

Facts of the Offence

[5] The admissions document sets out the following facts regarding the allegations against Mx. Tanguay-Dion:

1. On June 13, 2023, at around 3:00 a.m., [M.M.] attended at a party at the home of Gaston Tanguay-Dion (M[x]. Tanguay-Dion) in Dawson City, Yukon Territory, following a night of socializing.

2. [M.M]. and M[x]. Tanguay-Dion had become acquainted that summer, as [M.M.] would often attend Diamond Tooth Gerties (“Gerties”) - where M[x]. Tanguay-Dion worked - to listen to live music.

3. Approximately ten people attended the party, aside from [M.M.] Most attendees were employees of Gerties, and [M.M.] was acquainted with many of them. Most people at the party, including [M.M.], consumed alcohol.

4. At some point during the party, M[x]. Tanguay-Dion revealed to [M.M.] that [Mx. Tanguay-Dion] noticed her each time she attended Gerties. In response, [M.M.] indicated that she had a boyfriend, and she was not interested in a relationship or any sexual activity with M[x]. Tanguay-Dion.

5. Some hours later, in the morning, [M.M.] woke up in M[x]. Tanguay-Dion’s bed with M[x]. Tanguay-Dion lying next to her. [M.M.] was wearing a dress and underwear.

6. [M.M.] had no memory of entering M[x]. Tanguay-Dion’s bedroom or lying down in [Mx. Tanguay-Dion’s] bed. The last thing [M.M.] remembered was dancing in a circle in the kitchen during the party, putting her drink down, and picking her drink up again.

7. When [M.M.] woke up, M[x]. Tanguay-Dion’s hand was placed underneath her underwear, and [Mx. Tanguay-Dion] was fondling her clitoris.

8. M[x]. Tanguay-Dion took [M.M.'s] hand and placed it on [Mx. Tanguay-Dion’s] penis. [M.M.] stroked M[x]. Tanguay-Dion’s penis for a few seconds before removing her hand.

9. M[x]. Tanguay-Dion asked[M.M.] if [Mx. Tanguay-Dion] could perform oral sex on her. [M.M.] said no.

10. [M.M.] decided to leave and told M[x]. Tanguay-Dion that she needed to see her brother. M[x]. Tanguay-Dion left the home with [M.M]. and walked her to another residence.

11. On July 18, 2024, [M.M.] sent M[x]. Tanguay-Dion a Facebook message stating, “I guess the real issue is how you touched me without my consent while I was asleep.” M[x]. Tanguay-Dion responded, “I understand and I'm not going to try make an excuse for that. It was fucked up and I don't expect you to ever be comfortable with me at all.”

Basis for Concern About the Proposed Sentence

[6] The concern raised with counsel was that the proposed sentence does not fit within the range of sentences for similar offences in the Yukon as established by *R. v. White*, 2008 YKSC 34, and *R. v. Rosenthal*, 2015 YKCA 1.

[7] *White* involved a victim ending up at Mr. White's dorm room at the Yukon college after a night of drinking. They sat on Mr. White's bed, and she brought up that she had been sexually assaulted previously, at which time she "began blacking out and coming to". What followed is set out at paras. 5 and 6:

> 5. ...Eventually, she became tired and said that she wanted to lie down and sleep, but was concerned about getting up for school in the morning. She told the offender that she wanted to sleep on her own side of the bed. The offender said that was okay and told her not to worry. The victim lay down and went to sleep. She was wearing her pants at the time and the offender had a shirt and pants on.
>
> 6. The victim woke up with the offender on top of her. Her pants and underwear had been removed. The offender was not wearing pants or underwear and was trying to force sexual intercourse with the victim. She said "no" and "I don't want to" three or four times. The offender kept trying to put his penis inside her vagina. She was on her back on the bed and the offender was on top of her. The victim is just under five feet tall and weighs 115 pounds. The offender is five feet five inches tall and weighed about 220 pounds. After about ten minutes, the offender stopped attempting intercourse. The victim then waited for him to fall asleep, which he did after a further ten minutes or so. She got up, grabbed her clothing, and went upstairs to her aunt's room.

[8] The victim in *White* noted that she felt pain in her vaginal area during the assault and later observed an abrasion of her perineal area where the skin had been broken.

[9] Mr. White was a 39-year-old First Nations male who was attending college and working towards obtaining his G.E.D. He suffered from dyslexia, was a father to a 16-

year-old daughter not residing with him, and had a prior criminal record, including offences for violence. The matter proceeded to trial, and he did not express any remorse at the time of sentencing. It was noted that Mr. White had been apprehended under the child protection laws as a child and had essentially been on his own from the age of 14.

[10] He also presented positive reference letters from his landlord, employer, and regarding his volunteer activities.

[11] Justice Gower in *White* reviewed the range of sentences for sexual assaults in the Yukon, stating at para. 85:

> ...In reassessing this range, I wish to emphasize that I have only had regard to the jurisprudence in the Yukon, albeit with some insight provided from the N.W.T. and southern appellate courts. Further, I see my role here as involving a review and observation of what I understand the range to be - not to "set" a new range of sentence. With those caveats, it is my view that the current range in the Yukon for non-consensual sexual intercourse with a sleeping or unconscious victim, which is admittedly a very broad description of a type of sexual assault, with some exceptions, is roughly from one year, at the lower end, to penitentiary time in the vicinity of 30 months, at the higher end.

[12] The Court addressed the lack of vaginal penetration in the case at para. 21:

> The fact that there was no proof of penetration beyond a reasonable doubt is a neutral factor. Nevertheless, the attempt at penile penetration over a relatively protracted period of time and the resulting injury are sufficient to make this a serious sexual assault. ...

[13] In *R. v. G.W.S.*, 2004 YKTC 5, Lilles C.J., at para. 20, spoke of the profound effects on a woman's well-being which can result from a sexual assault even where intercourse is incomplete:

> ... [T]ypical feelings of humiliation, degradation, guilt, shame, embarrassment, fear, and self-blame can result from the unwanted invasion of intimate privacy and the loss of control associated with sexual victimization. ...

[14] Justice Gower addressed the circumstances before him and sentenced Mr. White to 26 months in custody.

[15] *Rosenthal* was a Crown appeal from a suspended sentence and two years' probation imposed after trial on a charge of sexual assault. The facts were briefly summarized at para. 2:

> The respondent and the victim were socializing and consuming alcohol with others at a home where the respondent often stayed. The victim asked to stay over and share the respondent's bed rather than go home late at night. The respondent agreed. The victim later awoke to find the respondent's finger in her vagina. She moved over and he removed his hand. She told him that she was not interested in having sex and went home.

[16] The Court in *Rosenthal* endorsed the range set out in *White*, referencing cases of digital penetration falling within the range at para. 8:

> There is no logical basis on which to exclude assault by digital penetration from the range, it being a serious and invasive form of sexual assault, as recognized by the trial judge.

[17] The Court then qualified the approach to sentencing ranges at para. 10:

> The Supreme Court of Canada has confirmed that sentencing judges are to pay heed to sentencing ranges. In *R. v. Nasogaluak*, 2010 SCC 6, the Court said (at para. 44):
>
> > The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency

> between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[18] The Court in *Rosenthal* also addressed the significant aggravating factor of an assault on a sleeping victim at para. 13:

> In R*. v. Netro*, 2003 YKTC 80, the prevalence of sexual assault on sleeping victims in Yukon was one of the factors which led the judge to reject a conditional sentence and impose a 12-month custodial sentence:
>
> > [22] The difficulty in considering a conditional sentence in this case arises from the circumstances not of the offender but of the offence. ... [T]he crime must be viewed in its community context. Sexual assault on unconscious and helpless victims is ... rampant in this jurisdiction and throughout the North.

[19] The Court of Appeal allowed the appeal and varied the sentence to 14 months' imprisonment.

Approach to Joint Submissions

[20] The Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, addressed the importance of joint submissions, and the approach to take when there are concerns with a joint submission. Both Crown and defence emphasised in their submissions that the position before the Court was a joint submission. Crown provided the position to the defence prior to plea and based on an agreement to proceed on a joint submission, Mx. Tanguay-Dion entered the guilty plea.

[21] The approach of counsel in submissions was not to justify the circumstances surrounding the joint submission as a basis for a sentence that was significantly outside of the acceptable range, but they did provide the basis for the agreement. Crown indicated that there was considerable alcohol consumption by individuals at the party, including M.M., and that does provide challenges to the prosecution in cases like the one before the Court. The Crown also advised that there were no concerns with M.M.'s cooperation. Defence indicated that there were some issues that were triable in the case, and her client chose to forego the option of trial in part due to her client's desire to spare the victim, and in part, due to the joint submission.

[22] This opportunity to address the circumstances of the joint submission was afforded to counsel based on the approach in *Anthony-Cook*, as highlighted in para. 53:

> Third, when faced with a contentious joint submission, trial judges will undoubtedly want to know about the circumstances leading to the joint submission - and in particular, any benefits obtained by the Crown or concessions made by the accused. The greater the benefits obtained by the Crown, and the more concessions made by the accused, the more likely it is that the trial judge should accept the joint submission, even though it may appear to be unduly lenient. For example, if the joint submission is the product of an agreement by the accused to assist the Crown or police, or an evidentiary weakness in the Crown's case, a very lenient sentence might not be contrary to the public interest. On the other hand, if the joint submission resulted only from the accused's realization that conviction was inevitable, the same sentence might cause the public to lose confidence in the criminal justice system.

[23] Crown and defence both took the position that the joint submission does not meet the threshold to be overturned, which was described in *Anthony-Cook* at para. 34:

> In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I

> agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold - and for good reason...

[24] The Nunavut Court of Appeal addressed the treatment of a joint submission by the sentencing judge in *R. v. Kuliktana*, 2020 NUCA 7, thoroughly considering *Anthony-Cook* and summarizing the circumstances where a judge might reject a joint submission at para. 101:

> Read together with the other reasons in *Anthony-Cook*, paras 53-60 refer to counsel providing an "account" or a "thorough justification" for the joint submission where it is "contentious". In my respectful view, Moldaver J was talking about a joint submission that is facially troubling to the point of conflicting with the public interest. This is needed to make the joint submission something that could allow the judge to "depart" from it: *Anthony-Cook* at paras 49-50. As with his use of the word "contentious", Moldaver J was talking about situations where, on the face of things, the joint submission would look to a reasonable observer as a case of a break down of the justice system.

[25] Crown counsel argued that while there were not necessarily any “benefits obtained by the Crown or concessions made by the accused” in this case to warrant a sentence outside of the acceptable range, based on the facts before the Court the proposed sentence was within the acceptable range of sentence.

Crown and Defence Justification of Joint Submission

[26] Both Crown and defence presented case law in support of their argument that the proposed sentence before the Court of a 90-day conditional sentence followed by

six months' probation was a fit sentence on the facts and within the range of sentences for similar offending.

[27] Crown counsel argued that the facts before the Court are distinguishable from *Rosenthal* due to the fact that the case before the Court did not involve penetration. According to the Crown, the lack of penetration of the vagina takes this case out of the serious sexual assault category contemplated in *White* and in *Rosenthal*.

[28] I note that in this case, there are additional aggravating factors that include:

1. The clear articulation of the lack of consent earlier in the evening; and

2. The actions of placing M.M.'s hand on Mx. Tanguay-Dion's exposed penis.

[29] The Crown alluded to the fact that there was some evidence that M.M. may have been so intoxicated that she lost memory and, rather than this being a circumstance that she woke up to being assaulted, she actually came to in the sense of being able to realize the circumstance she was in. This suggestion was rejected in Court based on the Admissions document having been agreed to by both parties, signed off, and entered into the Court record. These were the basis for the finding of guilt. Regardless, if M.M. was to have been so heavily intoxicated that she could not remember what was happening, she would have been in an extremely vulnerable state and unable to give consent, equating to a similarly aggravating circumstance to that of being asleep.

Case Law Relied on by Counsel

[30] Crown counsel filed four cases to support their position on sentencing:

1. *R. v. Amin*, 2023 YKSC 75, involved sentencing on three offences after trial:

    a. Count 3 took place after Mr. Amin was asked to leave the victim's residence and was described at para. 11:

> As she walked him to the front door, Mr. Amin pushed A.G.'s upper body against the wall of the stairs. He touched her breasts, grabbed her vagina, and stuck his tongue in her mouth. A.G. asked him to stop, saying she wanted to be just friends. She tried to push him away but he had pinned her against the wall. She said that her mom was coming home soon and she did not want her to see her like this. This was not true. He then stopped and left her house.

Mr. Amin was sentenced to 60 days in custody for this offence.

    b. Count 6 took place while Mr. Amin and the victim were parked in a motor vehicle talking and was described at para. 13:

> Mr. Amin began to touch S.G. on her legs, her neck, and had his head in her face trying to kiss her. She told him, "no", "get off", "please don't touch me" and said she did not want to kiss him. She tried to back up and put her hands on him to get him off her. He stopped and she drove him home.

Mr. Amin was sentenced to 90 days in custody consecutive for this offence.

c. Count 7 took place in a residence where Mr. Amin was permitted to stay the night in the same bed on the understanding that there would not be sexual activity, and was described at para. 16:

> Mr. Amin got into bed and got close to S.G. He began touching her with his hands in her crotch area, her breasts, her inner thighs, hips, and moved her hand towards his erection. When Mr. Amin started touching S.G., she told him, "no", "stop touching me", "I don't want to touch you". She then got out of bed and said to him, "You need to leave right now". He left the bedroom.

Mr. Amin was sentenced to four months in custody consecutive for this offence.

2. *R. v. Berseth*, 2019 ONSC 888, involved an offence that occurred at a banquet hall, described in para. 5:

> ...
>
> ...While the victim was dancing with her boyfriend she was approached from the front by the accused, who was a stranger to her at the time. As the accused passed the victim, he reached out and groped her vagina, trying to finger her through her clothing. The accused did not touch her skin, but the victim could feel his fingers pull in an upward direction through her clothing. The victim and her boyfriend saw

> the accused laugh and gesture with his hands to a friend immediately following.

Mr. Berseth received a conditional discharge with 15 months' probation.

3. *R. v. Charlie*, 2005 YKTC 58, involved an offence that occurred at the public library described in para. 2:

> With respect to the sexual assault offence, it appears that Mr. Charlie was in the Whitehorse Public Library. Another of the persons in the library was a woman, who was unknown to Mr. Charlie. The woman was bending over to hand her child a book when Mr. Charlie reached between her legs and touched her vagina. She screamed and Mr. Charlie desisted. She told him to stay where he was and he did so while the woman summoned the police. ...

Mr. Charlie received a three-month conditional sentence followed by nine months' probation.

4. *R. v. Phillippo*, 2022 ONCJ 499, involved an offence when the victim was in her bed asleep, described in paras. 2 to 4:

> 2 After their work Christmas party, Jeffery Phillippo and E.F. returned to her room for some wine. While chatting on the bed, E.F. fell asleep. As she slept, she felt Mr. Phillippo's hand on her collarbone. His hand moved downward into her t-shirt and touched her left nipple multiple times. E.F. turned her body which led Mr. Phillippo to quickly withdraw his hand.
>
> 3 Shortly thereafter, while still lying on the bed, E.F. felt his hand go up her t-shirt and down her sleeping shorts. His hand began playing with the band of her underwear and she felt a finger go under the elastic band and move side-to-side. The balance of his fingers were on top of her underwear.

> 4 Mr. Phillippo's hand then moved towards her buttocks, after which it moved to her inner hip. Mr. Phillippo's hand did not touch her vagina but was in her bikini line.

Mr. Phillippo was sentenced to a 90-day conditional sentence followed by 12 months of probation.

[31] These cases are all at the lower end factually of sexual offending. *Amin, Berseth,* and *Charlie* involve brief interactions of inappropriate touching over the clothes. It is notable that in *Amin,* he received custodial and consecutive sentences for the described conduct. *Berseth* and *Charlie* where very brief, and in public settings where the conduct could not be expected to continue. *Phillippo* is distinguishable based on the nature of the touching.

[32] Each of these cases do not involve vaginal penetration, which was the focus of Crown counsel in submissions, putting them in the “low end” of sexual offending. While factually distinguishable, the Crown’s focus was on the lack of vaginal penetration. With respect, I do not agree with the Crown’s position that penetration alone is the factor that distinguishes an offence and makes it serious. This ignores the extremely invasive nature of the assault before this Court and the aggravating factors as set out in the facts.

[33] Defence counsel filed three cases to support their position of sentencing:

1. *R. v. Abdullahi*, 2010 YKTC 76, involved an offence in a taxicab by the driver on a passenger described in para. 2:

> Shortly after picking her up, Mr. Abdullahi turned his taxi away from the direction of K.L.'s nearby residence. He grabbed her hand and put it on his upper thigh and groin area. She pulled her hand away but Mr. Abdullahi again grabbed it and put it on his exposed penis. K.L. removed her hand and asked Mr. Abdullahi to drive her to her friend's residence in Porter Creek, which he did.

Mr. Abdullahi was sentenced to a three-month conditional sentence followed by a nine-month probation order.

2. *R. v. Kapolak*, 2020 NWTTC 12, involved an offence on a residential street, described in para. 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.

Mr. Kapolak was determined to have a reduced moral blameworthiness due to a diagnosis, as explained in para. 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.

Mr. Kapolak was sentenced to a 120-day conditional sentence followed by an 18-month probation order.

3. *R. v. Scott*, 2021 NSPC 42, involved a 75-year-old man who approached twin boys aged 13 or 14 at the time, asked them to go for a walk with him during which he hugged one of the boys and touched his buttocks over the clothes three times, rubbed his own penis through his pants, then attempted to hug the second boy who felt Mr. Scott's hand touch his buttocks.

   Mr. Scott struggled cognitively throughout his life and had a grade 3 or 4 education and is unable to read or write. He was able to hold the same job for 28 years. He was sentenced to two three-month conditional sentences to be served consecutively, followed by a three-year probation order.

[34] I did not find defence counsel's cases to be particularly helpful in assessing an appropriate sentence for Mx. Tanguay-Dion. *Scott* and *Kapolak* involved significant cognitive impairment of the offender which is not a factor before this Court. The facts are distinguishable as well. *Abdullahi* is helpful to put into context the actions where

"Mx. Tanguay-Dion took M.M.'s hand and placed it on Mx. Tanguay-Dion's penis" as being a serious aggravating aspect of the overall assault. According to *Abdullahi*, that action alone would warrant a three-month conditional sentence followed by a nine-month probation order.

Additional Cases helpful to the Court

[35] The movement of the hand from the point of fondling the clitoris to penetrating the vagina is minimal. While the digital penetration of the vagina may be aggravating, it cannot be considered to be an act that alone takes the sentence from a serious sexual offence to that of a low-end sexual offence, or in terms of sentencing, from 14 months in custody to the 90-day conditional sentence proposed here. Adding the additional aggravating facts of touching the penis in the case before this Court, the Crown's submission in this regard is rejected.

[36] The Supreme Court of Canada decision in *R. v. Friesen*, 2020 SCC 9, addresses the common mistakes by courts in the categorization of sexual offending at para. 146:

> Fourth, it is an error to understand the degree of physical interference factor in terms of a type of hierarchy of physical acts. The type of physical act can be a relevant factor to determine the degree of physical interference. However, courts have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale (see *R. v. R.W.V.*, 2012 BCCA 290, 323 B.C.A.C. 285, at paras. 19 and 33). This is an error -- there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference. As the Ontario Court of Appeal recognized in *Stuckless (2019),* physical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration (paras. 68-69 and 124-25). Similarly, it is an error to assume that an assault that involves touching is inherently less physically intrusive than an

> assault that involves fellatio, cunnilingus, or penetration. For instance, depending on the circumstances of the case, touching that is both extensive and intrusive can be equally or even more physically intrusive than an act of fellatio, cunnilingus, or penetration.

[37] There are numerous cases where the courts apply an approach consistent with this pronouncement and have concluded that penetration is not the determining factor when considering what constitutes a serious sexual offence.

[38] In *R. v. Hume*, 2016 BCCA 230, the Court addressed a case that involved convictions for ss. 264.1, 271, and 279(2) of the *Criminal Code*. The facts are briefly described at para. 1:

> ...All offences involved the victim, D.H., and occurred in Mr. Hume's home. In brief, Mr. Hume invited D.H. over to his home for a drink, where D.H. passed out. When he awoke, he found Mr. Hume in the process of shaving the area under his testicles. When D.H. attempted to leave Mr. Hume's home, Mr. Hume threatened him with an empty liquor bottle. ...

[39] The shaving was further described in para. 7:

> When D.H. awoke he found himself naked on Mr. Hume's living room floor. Mr. Hume was in the process of shaving underneath his testicles, and various other areas of D.H.'s body (including his armpits, pubic region, around his anus, and portions of his legs) were already shaved. When D.H. protested, Mr. Hume said, "Don't be mad, your girlfriend will like it anyways".

[40] Regarding the sexual assault, Mr. Hume argued that the trial judge erred in characterizing the offence as serious, as set out in para. 31:

> Mr. Hume says that the characterization of the assault as "serious" is not reflective of an objective assessment of the evidence. He notes that sexual assault encompasses a very broad range of conduct. In the appellant's submission, a "serious" (or "major") sexual assault generally involves some form of non-consensual penetration, as opposed to sexual

> touching, although he concedes that penetration is not the "litmus test" for a serious sexual assault. ...

[41] The Court of Appeal in *Hume* reviewed the issue of penetration and the description of a sexual offence as serious, concluding at para. 40:

> Finally, as a matter of principle, it is not correct to say a sexual assault cannot be described as "serious" unless it involves forced intercourse or penetration. I cannot say, on these facts, that the judge exercised her discretion unreasonably in concluding that the sexual assault in this case was "serious".

[42] The Court of Appeal upheld a sentence of three years imprisonment, concluding at para. 52:

> In summary, the manner in which Mr. Hume shaved D.H.'s genitals and other body parts was highly invasive, humiliating, and degrading. The fact that there was no actual penetration or physical injury is not, in these circumstances, determinative of the seriousness of the assault. Mr. Hume's history of exemplary contribution to his community, while laudable, does not overwhelm the seriousness of the offence. The judge considered all of the foregoing, and I am unable to identify any error in her weighing of the factors relevant to the sentence. I conclude that she did not err in characterizing the sexual assault as "serious", nor was the sentence imposed demonstrably unfit.

[43] In *R. v. Stewart*, 2021 BCPC 303, the Court was sentencing Mr. Stewart on facts set out in para. 33 and 34:

> 33 The sexual assault by Mr. Stewart was by unwanted kissing, by picking up the Complainant and placing her on the bed, and in removing her panties. He forced the Complainant to endure oral-genital contact with his mouth and tongue on her vulva and around her genitalia. He held her legs apart while he rubbed his penis on her external genital organs. These are multiple acts of interference of the Complainant's intimate and private person and are, by any objective measure, serious and morally reprehensible acts.

> 34 The sexual interference was under one minute in duration and there was no penetrative act.

[44] Although the conduct did not include vaginal penetration, the sentencing judge described the nature of the assault at para. 42:

> The offender performed multiple acts of sexual touching, including kissing, cunnilingus and penile rubbing of the Complainant's outer genitalia. The acts were highly intrusive and the degree of physical interference was significant. This is an aggravating factor on sentencing.

[45] Mr. Stewart was a first-time offender with no criminal record, and there was a *Gladue* report before the Court. He was conducting a job interview with the victim and moved the interview to a private setting which was considered aggravating. The Court then reviewed precedent and stated the range for sexual offending of this type at para. 75:

> In assessing parity, the case authorities I have summarized in these reasons illustrate that a sentence of imprisonment, for a first time offender, of between one year and three years is liable to result for sexual assaults of the type and degree that include a combination of one or more of unconsented kissing, grabbing and groping of breasts or buttocks; genital area assaults by touching or groping; forced oral-genital contact with the victim; vulnerability of the victim by age or impairment by alcohol or drugs; or situational vulnerability of sleeping victims, cab passengers, or employees or prospective employees.

[46] Mr. Stewart was sentenced to 12 months' imprisonment followed by an 18-month probation order.

[47] In *R. v. Eustache*, 2014 BCCA 337, there was an appeal of a sentence of 12 months' imprisonment followed by a two-year probation order. The facts are set out in para. 2:

> The offence occurred on the Chu Chua Reserve near Barriere, on July 11, 2011. At the time of the offence Mr. Eustache was 48 years old. The victim, J.H., who had just turned 18, went to Mr. Eustache's home for a party at which a considerable amount of alcohol was consumed. At around 5:00 a.m., while J.H. was unconscious, Mr. Eustache took off her pants and his own pants, and rubbed his genitals against hers. He was interrupted when J.H.'s cousin came upon them. The sentencing judge was not satisfied penetration had been proven.

[48] The appeal in *Eustache* was focused on the Judge's application of *Gladue* and the seriousness of the assault itself was not addressed. However, on these facts, the Court of Appeal dismissed the Appeal, noting at para. 15:

> Further, there is no merit to the argument that the sentencing judge fell into error by failing to specifically state what effect the *Gladue* factors had on Mr. Eustache's moral culpability. It is evident the judge treated those factors as lessening that culpability. In this regard, it is to be noted Mr. Eustache's counsel and Crown counsel were in agreement that the upper end of the range for the offence was three years and Mr. Eustache has not suggested otherwise on this appeal.

[49] The British Columbia Supreme Court decision of *R. v. Malik*, 2012 BCSC 502, involved the sentencing of a taxi driver who drove a 17-year-old passenger to his residence where he assaulted her as set out in para. 6:

> ...
>
> > [31] A.B. testified that when the driver came out of the ensuite bathroom he sat on the bed to her right and put his left arm around her. He tried to kiss her and she said "No" and tried to get away. She was squirming and trying to get away and saying "Don't kiss me". She then tried to get up and get away, at which point he pulled her down to the floor and pulled her head towards his crotch. She said that he was trying to stick his penis in her mouth. She said she was clenching her mouth closed and was determined not to let that happen. He was also trying to pull down the straps of her bra and her dress. She kept pulling them back up. A.B. was wearing a dress she described as a "summer dress". ...

> ...
>
> [33] At some point both of them ended up on the floor, where she was underneath and he was on top. She was able to squirm away, so she grabbed her purse and ran down the stairs. She stopped to put her boots on and then ran out the door. ...

[50] Mr. Malik had no criminal record and a solid employment history. This was balanced against the aggravating factor of the age of the victim, and the opportunistic actions of Mr. Malik when the victim should have felt safe entering a taxi.

[51] Mr. Malik was sentenced to 18 months of imprisonment followed by a two-year probation order.

[52] In *R. v. C.R.F.*, 2024 BCSC 853, the British Columbia Supreme Court sentenced C.R.F. after trial on one count of sexual assault, on facts as set out in paras. 9 to 12:

> 9 The evidence was that C.R.F. was in the washroom and when he exited the washroom at the party, he returned to the family room and kitchen area and saw his wife, R.R., and J.C. engaged in some form of sexual activity in which they were topless.
>
> 10 J.C. testified that she and C.R.F. were then dancing and the next thing she knew her pants were down. The complainant testified she did not know how her pants were taken down: RFJ at para. 13. I did not make a finding of fact as to who lowered J.C.'s pants, but found that at some point C.R.F. found himself behind J.C. He attempted to perform cunnilingus on her but was not able to do so, because his throat was dry, and so he "couldn't do anything": RFJ at para. 50.
>
> 11 C.R.F. then touched J.C.'s vagina with his hand, inserting the index finger of his right hand from the tip of the finger to his first knuckle into her vagina: RFJ at para. 51.
>
> 12 The evidence was that R.R. then yelled at C.R.F. that he had crossed the line. C.R.F.'s wife also yelled at him, and C.R.F. and D.F. left R.R.'s home.

[53] C.R.F. had no criminal record and was noted to struggle with Attention Deficit Hyperactivity Disorder (“ADHD”), Obsessive Compulsive Disorder (“OCD”), and Dyslexia. He was married and operated a small business.

[54] The Court in *C.R.F.* described the seriousness of the assault in para. 51:

> As a starting point, I accept the submissions of Crown that the nature of the sexual offence was serious. C.R.F.'s actions seriously violated the personal integrity of J.C. He touched her vagina with his mouth and he inserted part of his finger into her vagina. The touching was of a sexual nature and unwanted.

[55] C.R.F. was sentenced to a 23-month conditional sentence followed by a period of probation of three years. The conditions imposed on the conditional sentence order were extensive and strict, the Court having noted at para. 90:

> I want to be clear that a CSO is a term of imprisonment which significantly restricts an offender's liberty, often for periods longer than would a sentence of incarceration. As established by the Supreme Court in *Proulx* at para. 127, restrictive conditions on conditional sentence orders, such as house arrest, should be the norm. Although served in the community, a CSO is both punitive and denunciatory. To accomplish these sentencing objectives, I will impose very restrictive, onerous, and lengthy conditions that will impose significant restrictions on C.R.F.'s liberty.

[56] I conclude from a review of these cases, as well as consideration of *White* and *Rosenthal*, that the offence outlined in the facts by Mx. Tanguay-Dion against M.M. constitutes a serious sexual offence and the range of sentencing is as set out in *White*. I find that the joint submission put forward in this case, in the words of the Supreme Court of Canada in *Anthony-Cook*, is a “submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting

certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down".

[57] The Court in *White* does not set a binding or restrictive range for the sentence before the Court. There will be cases where it is appropriate to impose a sentence above or below the indicated range, and that is explicitly acknowledged in the decision. I must consider the facts of the offender and the offence in determining the appropriate sentence for Mx. Tanguay-Dion.

Considerations in Sentencing Mx. Tanguay-Dion

[58] Mx. Tanguay-Dion has not taken any counselling in relation to the offence before the Court or with respect to alcohol use that formed part of the offence. I am told through counsel that Mx. Tanguay-Dion stopped drinking after this incident, and has not used illicit drugs in 18 months, but I note that there is no confirmation beyond this statement.

[59] Mx. Tanguay-Dion's background information includes:

- Currently being 32 years old;
- Having graduated high school in 2012 and attended college after graduation;
- Currently residing in Vancouver, British Columbia and being gainfully employed;

- A history dealing with the diagnosis of ADHD and other related mental health issues;

- Having experienced violence as a child, including sexual abuse and having an abusive father; and

- Experiencing abusive relationships as an adult.

[60] Mx. Tanguay-Dion advised the Court of being on a self-destructive path leading up to this offence.

[61] Mx. Tanguay-Dion expressed deep regret, remorse and shame for the actions of the offence before the Court. This is the primary reason for the guilty plea before the Court, as there was a desire not to re-victimize M.M. by proceeding with a trial. Defence counsel indicated that she considered there to be triable issues in this matter, but Mx. Tanguay-Dion was adamant that M.M. not be put through a trial and that the plea be entered. Mx. Tanguay-Dion deserves credit for the plea as a significant mitigating factor in sentencing, as sparing a victim from testifying in sexual assault cases avoids what can be a very stressful process and provides certainty.

[62] As previously noted, Mx. Tanguay-Dion is a first-time offender.

[63] The aggravating factors include:

1. The clear statement regarding the lack of consent to Mx. Tanguay-Dion expressed by M.M. earlier in the evening;

2. The vulnerable state of M.M. at the time of the assault. Mx. Tanguay-Dion was the party host, where alcohol was being served and where M.M. consumed a significant amount of alcohol. Mx. Tanguay-Dion had a heightened responsibility for the safety of the guests in the circumstances;

3. The digital fondling of M.M.'s clitoris under her clothing; and

4. Placing M.M.'s hand on Mx. Tanguay-Dion's exposed penis.

[64] A victim impact statement was not filed in this case. I rely on the statement from our Court of Appeal in *Rosenthal* on trial courts acknowledging psychological harm on a victim in sexual assault cases at para. 6:

> The trial judge did not err in declining to take judicial notice of the specific psychological consequences Crown counsel submitted would occur. In sentencing for sexual assault it is, however, proper to consider the likelihood of psychological harm to the victim: *R. v. McDonnell*, [1997] 1 S.C.R. 948. That likelihood is a reason that the principle of general deterrence is significant in sentencing for sexual assault. To the extent that the trial judge refused to acknowledge the likelihood of psychological harm from a sexual assault, he erred.

[65] In the absence of a victim impact statement from M.M., I take into account as an aggravating factor the likelihood of psychological harm to her given the circumstances of this offence.

Appropriateness of a Conditional Sentence

[66] The joint submission on sentencing put before the Court was for a conditional sentence, meaning that both the Crown and defence considered the circumstances of

Mx. Tanguay-Dion and the test for imposing a conditional sentence and determined that it was appropriate.

[67] The test for the Court to consider when imposing a conditional sentence as set out by the Supreme Court of Canada in *R. v Proulx*, 2000 SCC 5, requires that I be satisfied:

1. That Mx. Tanguay-Dion serving the sentence in the community would not endanger the community; and

2. Serving a conditional sentence in these circumstances is consistent with the principles of sentencing.

[68] There is no information before the Court regarding counselling, but this risk factor can be addressed through conditions in a conditional sentence order. A properly constructed conditional sentence can achieve the necessary denunciation and deterrence, which are paramount in cases of serious sexual assault for the actions of Mx. Tanguay-Dion and address any risk to the public.

[69] I accept the assessment of both counsel in this case that Mx. Tanguay-Dion can serve the sentence conditionally in the community. In imposing a conditional sentence, the period of custody is generally increased to reflect that it is being served in the community.

Sentence Imposed

[70] On the single count contrary to s. 271 of the *Criminal Code*, I sentence Mx. Tanguay-Dion to 12 months of custody to be served conditionally in the community.

This sentence has been increased to reflect the nature of the sentence from below the range in *White*, which reflects the mitigating circumstances including the guilty plea.

[71] The conditional sentence order will have the following conditions:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Report to a Supervisor within 24 hours and thereafter, when required by your Supervisor and in the manner directed by your Supervisor;

4. Remain within the Yukon unless you have written permission from your Supervisor;

5. Notify your Supervisor in advance of any change of name or address, and, promptly, of any change of employment or occupation;

6. Have no contact directly or indirectly or communication in any way with M.M. except with the prior written permission of your Supervisor and with the consent of M.M., in consultation with Victim Services;

7. Remain 25 meters away from any known place of residence, employment or education of M.M. except with the prior written permission of your Supervisor and with the consent of M.M., in consultation with Victim Services;

8. Reside as approved by your Supervisor and do not change that residence without the prior written permission of your Supervisor;

9. At all times, you are to remain inside your residence or on your property;

    a. except with the prior written permission of your Supervisor to attend to the necessities of life. Permission shall not be for more than two hours in any 24-hour period, and not more than four hours in any 7-day period; and

    b. except for the purposes of employment, having provided your Supervisor with your work schedule in advance, including travel directly to and directly from your place of employment; and

    c. except with the prior written permission of your Supervisor to attend counselling and treatment including travel directly to and directly from your place of counselling and treatment.

10. Not possess or consume alcohol or illegal drugs that have not been prescribed for you by a medical doctor. Provide a sample of your breath or urine for the purpose of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition;

11. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;

12. Not have any alcohol within your residence;

13. Attend and actively participate in all assessment and counselling programs as directed by your Supervisor, and complete them to the satisfaction of your Supervisor, for alcohol abuse, sexual violence, any other issues identified by your Supervisor, and provide consents to release information to your Supervisor regarding your participation in any program you have been directed to do pursuant to this condition; and

14. Make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts.

[72] The conditional sentence will be followed by a period of probation for a period of 12 months, with the following conditions:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify your Probation Officer in advance of any change of name or address, and, promptly, of any change of employment or occupation;

4. Have no contact directly or indirectly or communication in any way with M.M. except with the prior written permission of your Probation Officer and with the consent of M.M., in consultation with Victim Services;

5. Remain 25 meters away from any known place of residence, employment or education of M.M. except with the prior written permission of your Probation Officer and with the consent of M.M., in consultation with Victim Services;

6. Report to a Probation Officer immediately upon completion of your conditional sentence and thereafter, when and in the manner directed by your Probation Officer;

7. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer; and

8. Perform 75 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. This community service is to be completed no later than 45 days before the end of this order. Any hours spent in programming during the period of this order, should you continue to attend programming, may be applied to your community service at the discretion of your Probation Officer.

[73] Mx. Tanguay-Dion will be required to provide a suitable sample of DNA for testing pursuant to s. 487.051 of the *Criminal Code*.

[74] I have considered whether I should impose a *Sex Offender Information Registration Act*, SC 2004, c 10 ("*SOIRA*"), order. In the circumstances of the offence before the Court and the offender, I decline to make an order under *SOIRA*.

[75] As Mx. Tanguay-Dion is employed, there will be a victim surcharge of $100 with one month time to pay.

_____

PHELPS T.C.J.