Citation: *R.* v. *E.O.*, 2018 YKTC 28

Date: 20180629
Docket: 15-00357
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

E.O.

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Noel Sinclair — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

REASONS FOR SENTENCE

Introduction

[1] E.O. pleaded guilty, part way through his trial, to an offence contrary to s. 153 of the *Criminal Code*, namely, that:

> on or between May 1st, 2014 and August 3rd, 2015 at or near [redacted] in the Yukon Territory, being in a position of trust or authority towards S.G. a young person, or being a person of whom S.G. is in a relationship of dependency, did for a sexual purpose, touch directly the body of S.G., a young person, with a part of his body to wit his penis contrary to Section 153(1) of the Criminal Code.

[2] The Crown proceeded by way of indictment.

[3] The trial commenced on February 17, 2017. The Crown and defence submitted an agreed statement of facts with respect to the arrest of E.O. and the statement he subsequently provided police. The transcript and audio/video DVD recording of the statement formed part of the agreed statement of facts.

[4] Additionally, the Crown led evidence from S.G. and from her mother with respect to the allegation. Both were cross-examined by counsel for E.O. After the playing of the audio/video DVD recording as part of the Crown's case, defence sought and obtained an adjournment to have the DVD of E.O.'s statement forensically tested. E.O. waived any delay occasioned by this adjournment request.

[5] When the matter was next before the Court on June 27, 2017, E.O. applied to withdraw his plea of not guilty and entered a guilty plea to the sexual exploitation charge.

[6] The defence gave notice on June 27, 2017 of an intention to challenge the constitutionality of the mandatory minimum sentence of one year set out in s. 153(1.1)(a) of the *Code*. The formal notice was filed on July 28, 2017. Shortly thereafter, on August 4, 2017, the Crown made application for a summary dismissal of E.O.'s constitutional challenge.

[7] On the day on which E.O. changed his plea to guilty, defence indicated that E.O. was seeking a *Gladue* report. The report was ultimately finalized and submitted to the Court in mid-November 2017. At an appearance on November 16, 2017, the defence also requested that a circle sentencing be held. The Crown did not oppose this

application. The defence again waived any delay with respect to being tried within a reasonable time in relation to the circle sentencing.

[8] Additionally, the Crown made application to amend the Information by requesting that it be divided into two counts in order to recognize an increase in the maximum penalty provision which occurred during the course of the period of the offence. This application was later dismissed for reasons given in *R. v. E.O.*, 2018 YKTC 9.

[9] As a result of difficulty scheduling court dates for counsel's submissions on the various issues and the timeframe to organize a circle sentencing, I indicated that multiple rulings would be made at the end of the proceedings.

[10] Also, during the course of these proceedings, E.O.'s wife passed away unexpectedly.

Relevant Facts

[11] The victim, S.G., moved in with E.O., his wife and their son in the spring of 2014, when she was 16 years of age. She was born on March 20, 1998. E.O. and his family were living in a small Yukon community, a few hours by vehicle from the community in which S.G. had been residing.

[12] Both S.G. and E.O. are of First Nations ancestry.

[13] A number of years prior to this offence, S.G. had been sexually abused by her step-father, who was subsequently convicted for this abuse. She later experienced the loss of her father and grandmother. As indicated by S.G.'s mother, prior to moving in

with E.O. and his family, S.G. had been engaging in self-harm, such as cutting herself and consuming alcohol to excess. Her mother described S.G. as acting out and being rebellious.

[14] S.G.'s aunt, who is E.O.'s wife, offered to take care of S.G. for a while after the death of S.G.'s grandmother.

[15] E.O. indicated to police that he was aware that S.G. was moving in with them in 2014 because she was dealing with "life issues", and that E.O. and his wife were going to assist her.

[16] S.G. obtained full-time employment at the local grocery store. She bought some of the food she ate and considered herself relatively financially independent. E.O.'s wife gave S.G. some chores around the house and imposed some rules.

[17] S.G. came to trust E.O. and later confided in him that she suffered from depression and suicidal ideation. S.G. referred to E.O. as Uncle E. She also testified that she perceived E.O. as a father-like figure, due to the activities that they did together, such as snowmobiling and "four-wheeling". Near the end of their relationship, she sent a text message to E.O., in which she referred to him as "dad".

[18] E.O. was clearly in a position of trust with respect to S.G.

[19] E.O. initiated the first sexual contact with S.G. when she was 17 years of age. This occurred on July 2, 2015. The first sexual encounter between them occurred at the O. family cabin where they were alone. E.O. invited S.G. to the upstairs bedroom and

E.O. suggested that she wrap her arms around him. This progressed to sexual intercourse.

[20] E.O. admitted to sexual intercourse with S.G. “about five times”. He also admitted that he received “a few blow jobs” from S.G.

[21] On one occasion, when E.O. and S.G. were at the family cabin, they consumed hashish together. On another occasion, E.O. gave her a silver chain as a gift.

[22] When S.G.’s aunt discovered that her husband and S.G. were having a sexual relationship, she kicked her out of the house.

[23] S.G. went to the police on August 3, 2015 for assistance in retrieving her personal belongings from the O. household. Based on what S.G. described, the police commenced an investigation which led to the sexual exploitation charge.

Summary dismissal application to constitutional challenge

[24] The Crown makes application to summarily dismiss the defence’s constitutional challenge on the basis that this Court should “take a more proactive approach to the prevention of specific and institutional delays in the administration of justice”.

[25] The Crown contends that, as this Court lacks the jurisdiction to strike down s. 153(1.1)(a) and as the facts in this case are of a such an aggravating nature, the appropriate range of sentence is well beyond the one year mandatory minimum sentence. Therefore, there is no practical basis to hear the application, as the mandatory minimum sentence will not negatively impact E.O.’s sentence.

[26] The Crown initially submitted that the maximum sentence for this offence is 14 years imprisonment, and as such, even if the mandatory minimum sentence is displaced, E.O. would not be eligible for a conditional sentence order.

[27] Regarding this latter argument, the Crown subsequently conceded that the maximum period of imprisonment during part of this offence was one of 10 years' imprisonment. As noted, the Crown then applied to divide the Information into two counts to recognize that a maximum penalty of 14 years is applicable to the latter part of the offence. I concluded that the sexual exploitation charge in this case was made out before the increase to the maximum period of imprisonment, resulting in a finding that the maximum period of imprisonment for this single count offence is 10 years (see *R. v. E.O.*, cited above).

[28] It is settled that provincial and territorial court judges do not have the authority to make formal declarations striking down legislation, but at the same time these courts "have the power to determine the constitutionality of a law where it is properly before them" (*R. v. Lloyd*, 2016 SCC 13, at para 15). The *Lloyd* decision further explains that provincial and territorial court judges are not required to analyze the constitutionality of a mandatory minimum sentence in circumstances where it would have no impact on the sentence of the case immediately before the court. Judges should be cognizant of the need to use resources wisely and not on matters that need not be decided. (para. 18)

Constitutional challenge

[29] E.O. submits that the mandatory one-year minimum penalty for the offence of sexual exploitation infringes s. 12 of the *Charter*, which states that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[30] If I decide to entertain the constitutional challenge to the one-year mandatory minimum sentence, the process of analysis is explained in *R. v. Nur*, 2015 SCC 15. Firstly, I must determine what a proportionate sentence for E.O. is, considering the objectives and principles of sentencing found in the C*riminal Code*. Secondly, I must determine whether the one-year mandatory minimum results in a grossly disproportionate sentence to the fit and proportionate sentence. If it is, the mandatory minimum provision is inconsistent with s. 12 and therefore, unconstitutional unless saved by s. 1 of the *Charter*. (*Nur* at para. 46)

[31] If the sentence is not grossly disproportionate to a fit sentence for E.O., I should consider whether "reasonably foreseeable applications will impose grossly disproportionate sentences on others". (*Nur* at para. 77)

[32] The starting point in determining whether a constitutional analysis is necessary (as per *Lloyd*) is identical to the starting point in analyzing a constitutional challenge (*Nur*). Both require me to determine the appropriate sentence for E.O. at the outset, so I will firstly consider this issue.

Appropriate Sentence for E.O.

Position of the parties

[33] The Crown seeks a lower range penitentiary sentence based on the serious breach of trust involved in this offence. The Crown points out that the victim came to live in the O. household as a result of her serious vulnerabilities and E.O. took advantage of that in committing this crime.

[34] The defence contends that an appropriate response to this offence, in the absence of a mandatory minimum sentence, in all the circumstances of the offence and E.O. is a conditional sentence. The defence places significant reliance on E.O.'s previous good character, background and the fact that a guilty plea was ultimately entered.

Circumstances of E.O.

[35] E.O. is 52 years of age. He comes before the court with no criminal record.

[36] He is employed with the municipal government in his community. He performs a variety of functions, and during the circle process, was described as a "jack of all trades".

[37] E.O. is a member of the Nacho Nyak Dun First Nation. His father attended school in Dawson City. According to the *Gladue* report filed with the court, it appears that E.O.'s father attended a public school in Dawson City, while staying at St. Paul's hostel. E.O.'s father was not well treated while at school in a community a fair distance from his own.

[38] Although E.O.'s mother did not attend residential school, her siblings did. Children who attended residential school were negatively affected through the loss of their language and culture. As well, adults who remained within the community were negatively affected through the loss of their children to residential schools and, no doubt, through the feeling of disempowerment which resulted.

[39] Both of E.O.'s parents drank alcohol to excess which led to some spousal violence within the home. Nonetheless, E.O. has good memories of growing up.

[40] E.O. enjoys being out on the land by himself and is a good hunter. He learned about leading a traditional lifestyle from his grandfather. Although he has a good work history in carpentry and highway maintenance, as well as other work, it is acknowledged that he drinks alcohol regularly. As indicated by one of his sisters, E.O.'s lifestyle in this regard mirrors that of their father. His regular consumption of alcohol does not appear to impede his work performance. Nonetheless, there was some concern expressed in the circle that he continues to consume alcohol to excess.

[41] A September 13, 2017 risk assessment prepared for E.O. found that he is at low risk to re-offend for sexually abusive behaviour.

[42] As noted, E.O.'s wife passed away in 2017. This led to E.O. missing work due to stress and his grieving. On a positive note, E.O.'s son recently completed high school. E.O. is described by those close to him as being quiet and shy.

[43] E.O. has expressed remorse for the offence he committed. As evidenced in the circle sentencing process, E.O. has the support of many members of his community and

First Nation. He is viewed as a productive member of the community. Many of the speakers expressed surprise that he was before the court for this offence.

Caselaw

[44] Numerous cases were filed by the Crown and the defence. Understandably, a number of the decisions referred to by the defence pre-date the 2012 amendments to the *Criminal Code* that increased the minimum sentence for a s. 153(1.1) offence, when prosecuted by indictment, to one-year imprisonment and, when prosecuted summarily, to 90 days' jail. Notably, however, many of the decisions referred to by the defence involve cases where the Crown proceeded summarily.

[45] Others pre-date the 2005 amendments, which increased the maximum sentence of imprisonment, on an indictable election, from five years to 10 years, and which imposed a minimum jail sentence of 45 days. These amendments also imposed a minimum jail sentence of 14 days on a summary election. Additionally, the maximum sentence on a summary election increased from six to 18 months.

[46] As stated in *R. v. B.C.M.*, 2008 BCCA 365 at para. 32,

> …The principle that similar offenders should receive similar sentences requires acknowledgement that a minimum sentence has a proportionate inflationary effect on the balance of the sentencing range.

[47] Therefore, in my view, some of the sentencing cases relied upon by the defence are of limited assistance in determining an appropriate sentence for E.O.

[48] In addition to considering the relevant caselaw submitted by counsel, I have reviewed a number of other decisions, some of which I refer to below.

[49] In the decision of *R. v. S.J.B.*, 2018 MBCA 62, the Crown's appeal was allowed and a three-year sentence of imprisonment was imposed for the offence of sexual exploitation. The offender had been in a longstanding relationship with the victim's mother. As their relationship waned, he initiated conversations about sex with his then step-daughter, the 17-year-old victim, and ultimately raised the issue of sexual relations with her.

[50] Over a two-month period in 2015, he had unprotected sexual intercourse with the victim on between 10 and 12 occasions. The victim's mother ultimately discovered what her spouse was doing to her daughter. This discovery ultimately led to the offender being charged. The accused pleaded guilty.

[51] In overturning a reformatory sentence, the Court of Appeal found that the sentencing judge had erred in treating the absence of aggravating factors as mitigating. At paragraph 23, the Court noted:

> The judge erred when he characterised the lack of coercion, threat or pressure on the complainant to participate in sexual intercourse as a mitigating circumstance of the commission of the offence. The mere fact the complainant said "sure" to the proposition of the accused to having sexual intercourse does not reduce his moral blameworthiness.

[52] In substituting a three year penitentiary term, the following aggravating factors were noted:

- the nature of the relationship between the offender and the victim was one of *in loco parentis*;
- the significant age difference between them;

- the offender had abused his position of trust in relation to the 17-year-old victim;
- the sexual intercourse was unprotected, took place over two months, and did not end until the two were discovered;
- the offence had a significant impact on the victim's psychological health

[53] In coming to this decision, the Court noted at para. 39:

> The punishment for offenders committing sexual offences involving persons under age 18 has been steadily increasing over the last decade as there is greater understanding that, while the physical harm such offences cause is often transitory, the psychological harm is typically permanent and significant (see *R. v. R.J.*, 2017 MBCA 13 at para 11). A few months after the commission of the offence here, Parliament raised the maximum punishment for sexual exploitation from 10 years to 14 years' imprisonment (see section 4 of the *Tougher Penalties for Child Predators Act*, SC 2015, c 23).

[54] In *R. v. Frost*, 2016 MBQB 21, aff'd 2017 MBCA 43, Mr. Frost sexually exploited a 17-year-old victim who was a part-time employee of the offender's spouse, and who subsequently became involved in assisting the offender's children as a caretaker and a companion. At times, she stayed overnight in the Frost family home.

[55] Mr. Frost was aware that the victim was undergoing difficulties with her family, notably surrounding the separation of her parents.

[56] In early September 2012, the offender made sexual overtures to the victim which caused her concern. On September 28, 2012, Mr. Frost went to the victim's bedroom seeking to have sexual relations. The victim initially rejected the suggestion, but ultimately relented to his advances. Subsequent sexual encounters ensued and were,

at times, at the behest of the victim. These encounters continued until early November 2012 when the victim's mother discovered what was occurring and contacted the police.

[57] Just prior to the offence, Parliament had increased the mandatory minimum sentence to one year of imprisonment.

[58] The sentencing judge found that the aggravating factors included:

- the offender's age;
- the nuances related to his position of trust;
- the fact that the victim's mother had asked the offender to look out for her;
- the inappropriate sexualized comments and behaviour leading up to the first sexual incident;
- that the sexual activity only ended after it was discovered, although his position of trust had dissipated somewhat at that point.

[59] The sentencing judge found that the offence had badly contributed to the victims' ongoing troubled emotional state. At the same time, it was noted that the offender was not a risk to the community or any other young person, and that the offence was out of character. He had no prior criminal history. The sentencing judge determined that an appropriate sentence was one of 18 months' imprisonment to be followed by three years' probation. This was upheld by the Court of Appeal.

[60] The offence in *R. v. Aird*, 2013 ONCA 447, occurred after the 2005 amendments which stipulated a mandatory minimum sentence of 45 days' jail. Mr. Aird's appeal of his one-year term of imprisonment followed by one year of probation was denied. Mr. Aird was 28 and in teacher's college when he began tutoring the 17-year-old victim.

The tutoring commenced in the fall of 2008 and ended in February of 2009. In that time period, he and the victim started a sexual relationship which progressed from sexual touching to sexual intercourse. The sexual activity continued after the end of the tutoring relationship.

[61] The mitigating factors included the fact that the offender had no prior criminal history, his pre-sentence report was positive; he was deemed a low danger to reoffend, he enjoyed the strong support of his family and that he had lost his licence to teach, at least for a period of time, as a result of the offence.

[62] The aggravating factors included the length and nature of the sexual abuse, the vulnerability of the victim who had no prior sexual experience, the 11-year age difference between the two, and the negative impact of the offence on the victim. The Court of Appeal also considered that the offender's:

> …abuse of trust of a young person by itself is an aggravating consideration, though it is inherent in the offence of sexual exploitation…. (para. 56)

[63] The decision in *R. v. Power*, 2010 BCCA 21 considered a sentence appeal by the offender who had been found guilty of sexual exploitation involving a 14-year-old boy.

[64] Mr. Power was 47 years of age at the time he committed the offence. He practiced criminal law and, in his capacity as duty counsel, represented the victim. After the victim had been thrown out of his house one evening as a result of his behaviour, he coincidentally met up with the offender who invited him to stay at his apartment.

[65] The victim, who had never previously consumed alcohol, drank two alcoholic coolers offered to him by the offender. While in the same bed as the victim, the offender played a pornographic video. Ultimately, the offender put his hand down the boy's pants, after which he performed oral sex on him. Due to his shock and surprise, the victim did not resist. He ejaculated before falling asleep.

[66] In upholding the 18-month prison term followed by two years of probation, the Court of Appeal noted that the victim was vulnerable and that the offender had taken advantage of him while in a unique position of trust. Additionally, although the offender had no prior convictions, there was no mitigating factor of the offender having accepted responsibility for the offence.

[67] It should be noted that as this offence occurred in 2004, the maximum sentence, on an indictable election, was a five-year term of imprisonment. No mandatory minimum sentence applied. However, as the sentencing judge pointed out in her written reasons for sentence (2009 BCSC 1514), by the time the matter went to court, the maximum term of imprisonment had increased to 10 years and a mandatory minimum sentence of 45 days had been instituted.

[68] The sentencing judge stated at para. 25:

> Mr. Power is, of course, entitled to the benefit of the lesser punishment pursuant to s. 11(i) of the *Charter*. However, as noted by courts in other decisions, the amendments which have significantly increased the maximum sentence and have set a minimum sentence illustrate Parliament's view of the seriousness of this offence.

[69] In *R. v. D.B.S.*, 2018 YKSC 16, the offender was found guilty of two offences of having committed sexual interference against his granddaughter. The victim was aged 6 or 7 at the time of the first offence and 9 or 10 at the time of the second. At the time of the first offence the mandatory minimum sentence was 45 days' jail, which had been increased to 12 months by the time of the second offence.

[70] The offender, who was married to the victim's grandmother, helped raise the victim and her brother. The children lived with the offender and their grandmother during the abuse. In his bedroom, the offender touched the victim in her vaginal area, under her clothes and underwear, while her grandmother was out of the home. The offences caused the victim much emotional and psychological harm.

[71] Although the offence of sexual interference differs from that of sexual exploitation in some respects, the principles of sentencing are similar. For both, the primary sentencing considerations dictated by the *Code* are denunciation and deterrence of such conduct (s. 718.01). Additionally, in many sexual interference and sexual exploitation offences, the aggravating factor of a breach of trust accompanies the abuse (s. 718.2(iii)).

[72] Regarding both offences, it is important to remember that the abuse is of vulnerable individuals.

[73] In *D.B.S.*, Veale J. found the breach of trust to be significantly aggravating. However, he did not limit himself to considering the objectives of denunciation and deterrence, but also considered the secondary concerns of rehabilitation. D.B.S. had no prior history with the justice system. A *Gladue* report revealed that the offender's

community had not escaped the impacts of colonialism that must be considered as part of the relevant systemic and background context.

[74] Giving significant weight to rehabilitation, Veale J. imposed a global jail sentence of two years, less credit for remand time.

[75] The decision in *R. v. Fraser,* 2010 NSSC 194, involved a teacher sexually exploiting a student when she was 15 and 16 years of age. The 13-month-long abuse consisted of oral sex, as well as vaginal and anal intercourse. The offender was aware of the victim's personal circumstances, including feelings of anxiety and self-esteem problems. She was in a rebellious stage of her life. The offence had lasting negative effects for the victim. The offender was found guilty after trial. Cacchione J. reviewed the relevant sentencing caselaw after the 2005 *Criminal Code* amendments and held that sentences for sexual exploitation ranged from six months to four and one half years' imprisonment. He held that a nine-month jail sentence plus one year of probation was the appropriate sentence.

Analysis

[76] The fundamental purpose of sentencing as set out in s. 718 of the *Criminal Code* is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions with objectives which include:

(a) denouncing unlawful conduct;

(b) deterring offenders and others from committing offences;

(c) separating offenders from society, where necessary;

(d) assisting in rehabilitating offenders;

> (f) promoting a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

[77] As per s. 718.1 of the *Criminal Code*:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[78] Further, the Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, stated:

> 37 The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing -- the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. …

[79] Later, in the same paragraph, the Court says:

> …Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. …

[80] Pursuant to s. 718.01, when an offender is sentenced for abusing a person under the age of 18, primary consideration shall be given to the objectives of denunciation and deterrence.

[81] Other pertinent principles to this case that a court must take into account pursuant to section 718.2 are:

> (a) a sentence should be increased or reduced to account for any relevant aggravating and mitigating circumstances relating to the offence or the offender…
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> …
>
> shall be deemed to be aggravating factors;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> …
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. …

[82] As outlined in *Ipeelee*, and *R. v*. *Gladue*, [1999] 1 S.C.R. 688, the Court must impose a sentence that fits the offence, the offender, the victim, and the community.

[83] Sentencing is a highly individualized process which reflects the circumstances of the offence and of the offender (*Ipeelee*, para. 38, *R. v. M*. (C.A.) [1996] 1 S.C.R. 500 para. 92).

[84] No two cases are identical in terms of the circumstances of the offence or the circumstances of the offender. Sentencing is a 'profoundly contextual process' wherein

the judge has a broad discretion. (*R. v. L.M.,* 2008 SCC 31, at para. 15). "There is no such thing as a uniform sentence for a particular crime." (*R. v. M.* (C.A.), para. 92)

[85] As noted in the caselaw, the offence for which E.O. is being sentenced is very serious. The aggravating factors in this case are:

- the significant age difference between E.O. and the victim, some 34 years;
- E.O. abused his position of trust in relation to the vulnerable victim;
- the abuse occurred over approximately a month-long period, and did not end until the two were discovered;

[86] Two other matters should be noted. Although, E.O. ultimately pleaded guilty and has expressed his remorse, he does not receive the benefit of the substantial mitigating factor normally associated with a guilty plea, as S.G. was examined and cross-examined prior to the guilty plea being proffered.

[87] Secondly, there is no direct evidence concerning the impact of the offence on S.G. She has declined to file a victim impact statement. She clearly was a reluctant witness. In fact, at the first trial date, she did not appear to testify in response to her subpoena. S.G. has, however, filed a letter of support for E.O.

[88] On the other hand, S.G.'s mother indicated in a letter filed with the court that:

> I worry about [S.G.] every day, especially since my sister [A.O. (E.O.'s wife)] passed away because [S.G.] doesn't talk about what happened in [redacted]. She just seems to want to move on with her life.

[89] Despite the lack of a victim impact statement, and despite S.G.'s letter of support for E.O., I, nonetheless, may take into account the likelihood of psychological harm to

the victim as a result of this crime. (*R. v. McDonnell*, [1997] 1 S.C.R. 948, *R. v. Rosenthal,* 2015 YKCA 1)

[90] In my view, the mitigating factors in this case are:

- E.O. does not have a prior criminal history;
- He has the support of family and other members in the community and his First Nation;
- He is at low-risk to reoffend.

[91] I also am mindful of the *Gladue* factors that are present with respect to E.O. Although his circumstances are less devastating than other Indigenous offenders in the criminal justice system, he lives within a community undeniably affected by the legacy of colonialism, and his father experienced a situation similar to residential school. He is entitled to the consideration of s. 718.2(e) of the *Code*. It is appropriate to give substantial weight to his rehabilitation, which is strongly supported by members of his community.

[92] In my view, the appropriate sentence for E.O. is a period of incarceration of 15 months, followed by two years of probation. It is important to note that in making this finding as to the appropriate length of sentence for E.O., in addition to the factors detailed above, I have also considered the personal circumstances of E.O., including that his wife passed away in February 2017 and that he is caring for his son who just completed high school. I have also taken into consideration input from the individuals who participated in the circle sentencing process.

Whether to fully analyze the constitutional challenge

[93] I appreciate that a number of cases across the country have found the one-year mandatory minimum period of imprisonment for the offence of sexual exploitation to be unconstitutional (for example, *R. v. Hood,* 2016 NSPC 78, aff'd 2018 NSCA 18; *R v. Scofield*, 2018 BCSC 91, and 2018 BSCS 419; *R. v. E.J.B.* 2017 ABQB 726). I appreciate why courts, in the face of the fact situations before them and/or reasonable hypotheticals, have come to such a conclusion.

[94] I also am mindful of the fact that other courts have found that in cases of sexual exploitation prosecuted by indictment that pre-dated the one-year mandatory minimum jail sentence that a sentence of less than 12 months' imprisonment was appropriate (for example, *R. v. Fraser*, cited above) and/or that a conditional sentence was appropriate (see, for example, *R. v A. (A.G.)*, 1998 ABQB 60; *R. v A. (D.B.)*, 2006 ABPC 63)

[95] As noted, sentencing is an individualized process. Although I have found that a sentence of imprisonment of less than two years is appropriate, I also conclude that a conditional sentence would not be an appropriate sentence.

[96] As such, I do not find it necessary in this case to analyze the constitutionality of the sexual exploitation section.

[97] In coming to the conclusion that a conditional sentence would not be an appropriate sentence, I have applied the two stage test set out in *R. v. Proulx*, [2000] 1 S.C.R. 61. Firstly, the statutory prerequisites must be met, including a determination that a jail sentence served in the community would not endanger the community.

Secondly, it must be determined whether or not the sentence would be consistent with the fundamental principles of sentencing.

[98] I am satisfied by the September 2017 risk assessment prepared for E.O. that he is at low risk to re-offend. The assessor suggested that E.O. could benefit from counselling regarding "making appropriate life decisions particularly in regards to having appropriate relationships". The assessor also indicated E.O. might benefit from:

> …sexual offender specific treatment as the program may address cognitive distortions, healthy relationships and other risk related behavior that [E.O.] may experience.

[99] Despite the fact that E.O. does not appear to have followed up on these recommendations, he nonetheless is rated a low risk to reoffend. As such, a conditional sentence would not endanger the community.

[100] However, a conditional sentence in the circumstances of this offence and offender would be inconsistent with the fundamental principles of sentencing, particularly those of denunciation and deterrence. The aggravating factors in this case outweigh the mitigating factors. The teenage victim was quite vulnerable, and in fact, moved to the O. household in an attempt to deal with her ongoing personal issues. Although I do not find E.O. to be *in loco parentis* in relation to the victim, he was aware of the purpose of her moving into his and his wife's home. The victim considered him as an uncle and he was obviously a trusted adult for her.

[101] As E.O. became closer to the victim, she shared with him that she suffered from depression and suicidal ideation. Despite his being well aware of these significant vulnerabilities, E.O. sexually exploited the victim for his own gratification.

[102] Overall, I find his moral culpability to be high, even after having considered the *Gladue* factors which apply to him. In my view, in the circumstances of this case and of E.O., a conditional sentence would not properly address the relevant sentencing principles.

Sentence

[103] In the result, E.O. is sentenced to 15 months' imprisonment, to be followed by two years' probation on the statutory terms, plus the additional terms that:

- he report to a Probation Officer immediately upon his release from custody and thereafter, when and in the manner directed by the Probation Officer;
- attend and actively participate in all assessment and counselling programs as directed by the Probation Officer, and complete them to the satisfaction of the Probation Officer;
- have no contact directly or indirectly or communication in any way with S.G., except with the prior written permission of the Probation Officer and with the consent of S.G., in consultation with Victim Services.

[104] I also impose the following ancillary orders:

1. A 10-year firearms prohibition, pursuant to s. 109 of the *Criminal Code* with an exemption for sustenance hunting and trapping purposes;

2. An order under s. 487.051 of the *Criminal Code* for the provision of samples of DNA for analysis and recording;

3. E.O. shall comply with the *Sex Offender Information Registration Act* for a period of 20 years (s. 490.013(2)(b)).

4. Pursuant to s. 743.21, I order that during his time in custody, E.O. have no communication directly or indirectly with the victim, without a prior court order.

[105] I order that the victim surcharge of $200 be payable forthwith.

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CHISHOLM C.J.T.C.