R. v. Bradley-Luscombe, [2015] B.C.J. No. 1685

British Columbia and Yukon Judgments

British Columbia Provincial Court

(Criminal Division)

Duncan, British Columbia

B.M. Neal Prov. Ct. J.

Heard: April 21, 2015.

Judgment: June 2, 2015.

File No.: 34397-C-2

Registry: Duncan

[2015] B.C.J. No. 1685

Between Regina, and Erin Cody Bradley - Luscombe

(206 paras.)

Counsel

Counsel for the Crown: W. Paul Riley Q.C.

Counsel for the Defendant: Renee Miller.

RULING ON APPLICATION

B.M. NEAL PROV. CT. J.

Overview

1 The facts and law engaged in this case relate to the application of subsection 5 (3) a (ii) C of the *Controlled Drugs and Substances Act (the "CDSA")* The recent legislative amendments giving rise to subsection 5 (3) a (ii) C were part of a broader sentencing regime, Bill C-10, which included minimum jail terms for specific drug offences in relation to substances listed in prescribed schedules and upon proof of certain defined aggravating factors.

2 In the submission of Crown Counsel.

> *"The legislative scheme is carefully tailored to address the seriousness and blameworthiness of a range of drug offending conduct "*

3 The Crown submits that as a matter of law, this most recent manifestation of Parliament's sentencing policy with respect to drug offences is entitled to deference under the *Charter of Rights and Freedoms*. The Crown specifically

relies on the words of LeBel J., in *R v Nasogaluak*, 2010 SCC 6 at para 45 as follows:

> *"this regime is a "forceful expression of governmental policy in the area of criminal law", which courts are bound to uphold unless it is shown to lead to grossly disproportionate punishments."*

4 Counsel for the Applicant challenges the constitutionality of subsection 5 (3) a (ii) C of the CDSA submitting that the legislative amendment breaches both sections 7 and 12 of the *Charter*. The submission is made by Counsel for the Applicant that the legislative amendments result in punishment that is both cruel and unusual, and grossly disproportionate to the punishment that is otherwise appropriate for the Applicant.

5 Since these new legislative amendments were enacted, a number of provisions have been the subject of judicial consideration in the context of the *Charter*. In *R v Trasolini*, Vancouver No 217842-1, BCPC this Court considered sub section 5 (3) a (ii) A of the *CDSA* in the context of section 7 of the *Charter*. In *R v Dickey*, 2015 BCSC 191, the Supreme Court of BC considered the same sub section in the context of section 12 of the *Charter*. In *R v Lloyd*, 2014 BCCA 224 the British Columbia Court of Appeal considered sub section 5 (3) a (ii) D of the *CDSA* in the context of sections 7 and 12 of the *Charter*. Most recently, in *R v Nur*, 2015 SCC 15 the Supreme Court of Canada has considered the mandatory minimum sentences imposed by s 95(2)a (i) and (ii) of the Criminal Code and confirmed the approach to be taken in undertaking a challenge arising under section 12 of the Charter.

6 As noted above, the facts of this case raise issues with respect another mandatory minimum sentencing provision, subsection 5 (3) a (ii) C of the CDSA in the context of challenges to those provisions arising under section 7 and 12 of the Charter.

Summary of Findings and Rulings

7 Having considered the facts and authorities adduced, I am satisfied that subsection 5 (3) a (ii) C of the CDSA does not infringe the Applicant's rights under section 7 of the *Charter*.

8 I am satisfied, however, that this subsection does violate section 12 of the *Charter* with respect to the Applicant. Considering all of the evidence and relevant law, I have concluded that the mandatory minimum punishment required by subsection 5 (3) a (ii) C of the CDSA is more than merely excessive, it results in a grossly disproportionate sentencing impact on the Applicant on the facts of this case..

Background

9 The applicant, Mr. Bradley-Luscombe, ("the Applicant"), has entered a plea of guilty to count 2 on information number 34397 C-2, possession of cocaine for the purposes of trafficking ("PPT") on May 1,2013 in Duncan BC, contrary to subsection 5(2) of the CDSA.

10 On May 1,2013 the Applicant was 20 years of age. Also arrested with the Applicant, was "G", a youth admitted to have been 17 on the date in question.

11 June 13, 2013 Federal Crown filed a notice that it would seek the mandatory minimum sentence for the Applicant pursuant to subsection 5 (3) a (ii) C of the CDSA . That section provides as follows:

> (3) Every person who contravenes subsection (1) or (2)
>
> * (a) subject to paragraph *(a.1)*, if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life, and
>
> ii) to a minimum punishment of imprisonment for a term of two years if
>
> (C) the person used the services of a person under the age of 18 years, or involved such a person, in committing the offence;

12 Although the majority of the Crown's case relevant to sentencing was admitted by the Applicant, some material facts were not. Specifically, it was not admitted that the Applicant used the services of or involved "G", a person under the age of 18, in committing the offence before the court for sentencing.

13 As a result of the Applicant's position, a hearing was convened to determine the full facts and circumstances to be considered on sentencing following the process in *R v Gardiner* [1982] 2 S.C.R. 368.

14 At the conclusion of the *Gardiner* hearing, I found that the Crown had proven beyond a reasonable doubt that the Applicant had used and involved "G" in the commission of the offence of PPT as a result of the following factors:

(a) "G" was driving a vehicle with the Applicant as a passenger to a location set by the Applicant with undercover police officers for an illicit sale of cocaine . As such, "G" provided transportation assistance to the Applicant by facilitating his arrival at the scene of the ultimate arrest during the course of a dial a dope delivery of cocaine;

(b) "G"; was arrested with the Applicant in the context of the police investigation of the PPT offence;

(c) "G" had funds totalling $584.75 seized from his person on arrest. Although "G" was ultimately released from custody, was not charged and had his money returned by police, the Court found that the Crown had proven beyond a reasonable doubt that "G" was in fact embroiled in or drawn into the Applicant's criminal offence of PPT on May 1st 2013 and was therefore involved in the same; and

(d) The delivery of cocaine to prospective purchasers in exchange for money is a common feature of dial a dope operations requiring transportation of the vendor and illicit drugs to the prospective purchaser.

15 In summary therefore, on both aspects of subsection 5 (3) a (ii) C of the CDSA, I found that the Crown had proven beyond a reasonable doubt that the Applicant had both used the services of "G" and involved him in the commission of the offence committed PPT. As a result, the subsection 5 (3) a (ii) C aggravating factors were found to be applicable to the facts of this case and the Applicant.

Charter of Rights and Freedoms- Section 7 & 12

16 Having found that the mandatory minimum sentence criteria set out in subsection 5 (3) a (ii) C of the CDSA apply to the Applicant, the next issues relate to the Charter.

17 The Applicant challenges the constitutional validity of the mandatory minimum two year jail sentence required by the application of subsection 5 (3) a (ii) C on two grounds:

Firstly, the Applicant submits that the two year minimum

jail sentence in subsection 5 (3) a (ii) C of the CDSA is

inconsistent with section 7 of the *Charter*; and

Secondly, the Applicant submits that the two year minimum jail sentence in question is inconsistent with section 12 of the *Charter*

Background to the Applicant's Conviction

18 The facts relating to the Applicant's conviction are set out in my earlier ruling resulting from the *Gardiner* hearing but can be summarized as follows:

(a) In the course of a dial-a-dope drug trafficking investigation in the Duncan area, police officers posing as drug purchasers called phone number 250-710- 4300. The person who answered the phone

refused to deal with either officer. One of the officers then sent a series of text messages to the same phone number and, after answering some screening questions, arranged to meet the trafficker at a vacant lot on Brae Road to purchase a street-level quantity of cocaine.

(b) The Applicant arrived at the scene of the proposed transaction as the passenger of a vehicle driven by a young person, "G". The Applicant was holding the cell phone used to arrange the drug transaction, and he had $325 cash in his wallet.

(c) As the police approached the vehicle, one of the officers saw the Applicant throw a single package of cocaine, later recovered and found to weigh 0.4 grams. The police later seized a further 14 packages of cocaine with a total weight of 5.3 grams from the back seat of the police vehicle in which the Applicant was transported to the police station.5 At $50 per package, the drugs had a total street value of approximately $750.

(d) A police officer later examined the cell phoned seized from the Applicant and noted that there were a total 130 missed calls and 10 text messages in the three to four hour period following the arrest. The officer also answered four incoming calls from individuals seeking to purchase drugs.

Circumstances of the Applicant

19 The Applicant was born on 7 February 1993, making him 20 years old on the date of the offence and 22 years old at present.

20 Crown takes no issue with the submission of Counsel for the Applicant that the Applicant has had a difficult upbringing, due in large part to substance abuse problems in his own family. He became estranged from his parents at 13 or 14 years of age fending for himself until at age 16 when he began to receive social assistance. That social assistance continued for two years ending on the Applicants 8th birthday.

21 The Applicant completed high school in June of 2011 but at that point had not completed all required courses for graduation. The Applicant has, however, through various means, completed his "Dogwood" graduation certificate awarded in April 2012.

22 Subsequent to the Applicant's arrest in May of 2013 he was released on bail. Counsel for the Applicant submits that he then moved to live with his estranged mother, and began working for a local window cleaning business until the end of August 2013. In September he is reported to have changed employers moving to a local construction company and ultimately in February of this year to a local restaurant where he remains employed.

23 In terms of criminal history, the Applicant has a limited youth record as follows:

(a) July 13, 2009 a conviction for break and enter for which the Applicant received a conditional discharge and probation for 6 months;

(b) June 24, 2010 a conviction for failing to comply with a Youth Court disposition for which the Applicant was ordered to perform 25 hours of community work service;

(c) Dec 9, 2010 convictions for unlawfully taking a vehicle without owner's consent, breach of undertaking and failing to comply with a Youth Court disposition in respect of which he received probation for 12 months and an order to perform 25 hours of community work service;

(d) April 17, 2012 a conviction for failure to comply with a Youth Court disposition for which he received a fine of $150.00.

24 The Applicant has one adult conviction September 3, 2013 for failure to appear in Court contrary to section 145(4) of the Criminal Code which resulted in a fine of $100.00

25 The Applicant, therefore, has no cognate convictions either adult or youth relating to the matters currently before the Court for sentencing.

26 Defence counsel's submissions suggest that at the time the Applicant was arrested on the matter currently before the court, he supported himself with the assistance of friends and family. An inference can be drawn from the facts, however, that the Applicant was at least partially supported during this time through involvement in the drug trade. As his Counsel put it in submissions concerning the Applicant's circumstances, when his social assistance lapsed, the Applicant became "financially strapped" and was "introduced to the drug trade" by an associate of his drug-addicted father. The specific submissions, not challenged by Crown, were that the Applicant was "a vulnerable young man with no resources preyed on by an adult friend of his drug addicted father who introduced him to the drug trade."

27 As Crown has noted, and Counsel for Applicant did not dispute, there is no indication that the Applicant was involved in trafficking to fund an addiction. His involvement with respect to the dial a dope operation appears simply to have been financially motivated.

28 Finally, Counsel for the Applicant submits that he has entered a guilty plea acknowledging responsibility for the offence of PPT, is remorseful, abiding by his bail terms and now constructively engaged with both family and community.

Issue # 1- Section 7- Charter and subsection 5 (3) a Hi) C of the CDSA

29 I turn now to the first issue raised by the Applicant, an alleged breach of Section 7 of the Charter with respect to the application of subsection 5 (3) a (ii) C of the CDSA.

30 Section 7 provides as follows:

> *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice*.

31 The principles of fundamental justice alleged to have been breached with respect to the application of subsection 5 (3) a (ii) C of the CDSA include:

(a) The lack of proof of mens rea required for an offence resulting in a custodial penalty; and

(b) Overbreadth & arbitrariness in the application of subsection 5 (3) a (ii) C of the CDSA.

Mens Rea Issue

32 In the *Gardiner* proceedings I found that the Crown had no obligation to prove *mens rea* in establishing the aggravating factor set out in subsection 5 (3) a (ii) (C) of the CDSA.

33 The Applicant's submission is that the lack of a *mens rea* requirement as a result of the application of subsection 5 (3) a (ii) C results in a minimum term of imprisonment of two years on a strict liability basis. *R v Sault Ste Marie [1978] 2 S.C.R. 1299, Reference re sec 94(2) MV A [1985] 2 S.C.R. 486*.

34 The submission is that subsection 5(3) a (ii) C is a law that creates an absolute liability aggravated circumstance to what is attached the penal consequence of a minimum 2 years of federal imprisonment which is therefore a breach of section 7 of the *Charter*.

35 The Crown submits that imprisonment as a matter of absolute liability incorrectly characterizes a sentencing under subsection 5(1) or 5(2) of the CDSA. It is submitted that offences arising under both sub sections require

proof of *mens rea* and proof of the offender's knowledge of the illicit nature of the drug and an intent to traffic the drug to another person. It is further submitted that no one who is morally innocent can be convicted under section 5 of the CDA and therefore no one who is morally innocent stands to be sentenced under subsection 5(3) a (ii) C.

36 The Crown further submits that there is no constitutional requirement that "intention extend to ail aspects of an unlawful act" for the purposes of establishing guilt, much less for the imposition of sentence. Crown relies on the decision of Lamer J. in *R v De Sousa [1992] 2 S.C.R. 944 para 38*.

> [t]here appears to be a general principle in Canada and elsewhere that, in the absence of an express legislative direction, the mental element of an offence attaches only to the underlying offence and not to the aggravating circumstances.

37 Finally, the Crown submits that since there is no constitutional requirement for *mens rea* or subjective knowledge in respect of each external element of the offence, be it a consequence or circumstance, it stands to reason that there is no constitutional imperative requiring proof of *mens rea* with respect to statutory aggravating factors for the purpose of sentencing.

Findings on the Mens Rea Issue

38 On this issue l find that the Applicant is not being sentenced for an offence on a strict liability basis.

39 The underlying offence of PPT requires proof beyond a reasonable doubt of all of the essential elements of that offence, proof that in this case the Applicant has admitted. An essential component of that proof is the *mens rea* of the offence. It cannot be said, therefore, that the Applicant is being sentenced with respect to a matter with the risk of imprisonment without proof of *mens rea* beyond a reasonable doubt.

40 A conviction under either subsections 5(1) or 5(2) of the CDSA carries with it the potential for life imprisonment under subsection 5(3).

41 in entering a guilty plea the Applicant was at risk of that consequence, although the precise sentence is, of course, subject to the application of usual sentencing principles and the law.

42 In the circumstances of this case, I cannot find that there has been a breach of the Applicant's rights under section 7 of the Charter as result of a risk of imprisonment absent proof of mens rea. The requirement for proof of *mens rea* lays in the elements of the offence of PPT that must be established by the Crown, not the aggravating circumstances relevant to that offence.

Overbreadth and Arbitrariness Issue

The Applicant's Submissions

43 The Applicant's second submission with respect to section 7 of the Charter relates to overbreadth and arbitrariness in relation to subsection 5 (3) a (ii) C of the CDSA.

44 With respect to this argument Counsel for the Applicant relies on *R. v. Heywood*, [1994] 3 S.C.R. 761 (Vol. 2, tab 8). In that decision, Cory, J. writing for the majority states at para. 49-50:

> [49] Overbreadth analysis looks at the means chosen by the state in relation to its purpose, in considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been Limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

> [50] Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual. This type of balancing has been approved by this Court: see Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, per Sopinka J., at pp. 592-95; R. v. Jones, [1986] 2 S.C.R. 284, per La Forest J., at p. 298; R. v. Lyons, [1984] 2 S.C.R. 633 supra, per La Forest J., at pp. 327-29; R. v. Beare, [1988] 2 S.C.R. 387, at pp. 402-3; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at pp. 538-39; and Cunningham v. Canada, [1993] 2 S.C.R. 143, at pp. 151-53. However, where an independent principle of fundamental justice is violated, such as the requirement of mens rea for penal liability, or of the right to natural justice, any balancing of the public interest must take place under s. 1 of the Charter: Re B.C. Motor Vehicle Act, supra, at p. 517; R. v. Swain, [1991] 1 S.C.R. 933, at p. 977.

45 The submission of Counsel for the Applicant is that subsection 5 (3) a (ii) C is overbroad It is submitted that the law is overbroad in that it casts too wide a net in order to shield young persons from drug transactions without requiring a specific connection between the transaction and the young person.

46 Counsel for the Applicant submits that the words "use", "services" and "involve" capture all manner of transitory, accidental, inadvertent and peripheral circumstantial conduct as demonstrated in the case at bar and in the following examples:

a) A person may possess cocaine for the purpose of trafficking on a public bus seated next to a stranger who happens to be under the age of 18, and thereby "involves" that young person in the circumstances of his offending.

b) An offender who sells to a drug-addicted person who is unaware that the person is carrying a baby on their back "uses" or "involves" a person under the age of 18.

c) A dealer who returns an adult's phone call, and is unaware that a person under the age of 18 answers the phone before passing the phone to a parent, has unknowingly involved or used the services of a young person in a drug transaction.

47 The Applicant relies on the decision of Harris PCJ, of the Provincial Court of British Columbia in Vancouver in *Trasolini*.

48 In *Trasolini*, the Court found at paragraphs 39 and 45 that temporally, subsection 5 (3) a (ii) A of the CDSA does not require any connection between the presence of young persons in the area described and the time of the transaction. In doing so, Judge Harris found a breach of section 7 of the Charter.

49 The Applicants submission is that, subsection 5 (3) a (ii) C of the CDSA requires no specific connection between the offence of PPT and the young person involved in the case before the Court.

50 In terms of arbitrariness, Counsel for the Applicant submits that subsection 5 (3) a (ii) C is arbitrary when considering the laws objectives. The Applicant relies on *Canada v. PHS Community Services*, [2011] 3 SCR 134 (Vol. 3, tab 14), McLachlin, C.J. writing for the Court states at para. 129,

> "[w]hen considering whether a law's application is arbitrary, the first step is to identify the law's objectives."

51 Counsel for the Applicant submits that the objective of the drug possession laws considered in *PHS* was the protection of health and safety of the community. The Court found that safe injection sites contribute to those objectives. As a result, the Minister's decision not to extend an exemption to the injection sites was found to be arbitrary and in breach of s. 7 of the Charter.

52 Counsel for the Applicant further submits that the imposition of the minimum mandatory sentence in subsection 5 (3) a (ii) C is similarly arbitrary; in that it applies inconsistently to different accused by operation of s. 10(4)-(5) of

the CDSA. Specifically, it is submitted that the mandatory nature of subsection 5 (3) a (ii) C of the CDSA does not recognize that accused may resolve their drug addiction issues in advance of sentencing thereby furthering the state objective of protecting persons under the age of 18 from exposure to the drug trade.

53 Finally, Counsel for the Applicant further submits that the saving provision in sub sections 10(4) and (5) of the CDSA operates in an arbitrary manner.

54 There is, however, no submission from Counsel for the Applicant that he has an addiction issue related to illicit drugs, nor any evidence that either section 10(4) or (5) of the CDSA would have any relevance to the Applicant in sentencing on the matters before this Court.

The Crown Submissions

55 The Crown submits that subsection 5 (3) a (ii) C does not operate unconstitutionally as either arbitrary or overly broad legislation.

56 The Crown submits that arbitrariness and overbreadth are closely related, but properly considered as distinct concepts under s. 7 of the *Charter*. The submission is made that these concepts ensure that the means by which the state seeks to attain its legislative objectives are not "fundamentally flawed".

57 The Crown further submits that arbitrariness is concerned with the connection between the purpose of the law and the impugned effect on the individual. A law is arbitrary where there is "no rational connection" between the state objective that a particular law is intended to achieve and its effect on life, liberty, or security of the person: *Canada (AG) v Bedford* 2013 SCC 72.

58 Overbreadth, the Crown submits, addresses those cases where a law, while rational in its general application, nevertheless overshoots its target. Thus, a law may be rationally connected to its purpose, but overbroad in its effects. A law is overbroad where there is "no connection" between its objective and some of its effects on life, liberty, or security of the person.

59 The Crown maintains that the constitutional thresholds of arbitrariness and overbreadth are not easily met. It is submitted that the Court must be satisfied that the law is inherently bad because there is no connection, in whole or in part, between the law's purpose and effects. The party alleging the *Charter* infringement must show that there is "no connection" between the laws purpose and its effects.

60 The Crown submits that the focus is not on the legitimacy of the state objective, but the means used to attain it. The concepts of arbitrariness and overbreadth ensure that the means by which the state seeks to attain its intended objective are not "fundamentally flawed".

61 The judiciary's role under the *Charter*, the Crown submits, is to determine constitutional protections and limits, not to pass judgment on the wisdom of the legislation or the policy choices underlying it. *R* v *Khawaja*, [2012] 3 S.C.R. 555.

62 The Crown submits that the object and purpose of subsection 5 (3) a (ii) C of the CDSA is to protect those under 18 years of age from exposure to the physical and social evils of the drug trade by virtue of their use or involvement in the same by an accused. The Crown maintains that considered in that context, sub section 5 (3) a (ii) C is neither arbitrary nor overbroad.

63 With respect to arbitrariness, the Crown submits that, It cannot be said that there is "no connection" between the objective of protecting young persons from the physical and social ills of the drug trade and the two year minimum jail term for using the services of or involving a young person in the commission of a serious drug offence.

64 Given the direct link between the objective of the law and the means chosen to attain it, the Crown submits that the impugned provision does not run afoul of the stringent threshold of arbitrariness.

65 The Crown further submits that the two year jail minimum term in subsection 5 (3) a (ii)(C) is engaged only where the offender is proven beyond a reasonable doubt to have knowingly committed an offence of trafficking or possession of a controlled substance for the purpose of trafficking. Moreover, the Crown submits that it must prove that the offence was aggravated by the fact that a young person was used or involved in the commission of the offence. It is only in these narrow circumstances that the two year minimum jail term is engaged.

66 The Crown maintains that *Heywood*, relied on by the Applicant, is distinguishable in that the law under consideration, section 179 (1) b of the Criminal Code, applied not only to places frequented by children, but also to public parks of any sort.

67 By contrast, the Crown argues that subsection 5(3) a (ii) C of the *CDSA* is not an offence provision. The Crown maintains that this sub section does not restrict anyone's liberty to access or use public facilities, but rather merely creates a heightened penalty for those who traffic drugs or possess drugs for the purpose of trafficking and who use or involve a young person in the commission of the offence.

68 Finally, the Crown submits that the hypothetical scenarios raised by the Applicant describe conduct that is merely proximate to or incidental to the trafficking offence and would be unlikely to engage sub section 5 (3) a (ii) C on the facts outlined. *R V Morrisey 2000 SCC 39*

Findings concerning Arbitrairness and Overbreadth of subsection 5 (3) a (ii) C CDSA

69 There is no dispute that the underlying purpose of subsection 5 (3) a (ii) C is the protection of young persons from use or involvement in the drug trade. In that sense, the law in question is more specific than section 5 (3) a (ii) C in its application to an accused.

70 On the facts of this case, proof was required beyond a reasonable doubt of "use" and or "involvement" of a young person in the underlying offence of PPT committed by the Applicant in order to engage subsection 5 (3) a (ii) C of the CDSA.

71 With respect to arbitrariness I cannot find that there is "no rational connection" between the state objective of protecting young persons from use or involvement in the drug trade and the operation of subsection 5 (3) a (ii) C of the CDSA. The law links overt action to "use or involve" a young person in offences under section 5 of the CDSA and establishes a statutory aggravating factor to be applied with minimum penalties for such conduct. The general nexus between the expressed legislative objective and legislative sanction are established within the tests established in *Canada (AG)* v *Bedford* and *R v Khawaja*.

72 With respect to overbreadth, I have considered the tests set out in *Heywood*. ! cannot find that sub section 5 (3) a (ii) C overreaches in achieving its legislative goals.

73 In *Trassolini*, the Court found that for the purposes of s. 7, subsection. 5 (3) (a) (ii) (A) does not require any temporal connection between the presence of young persons in the area and the time of the transaction.

74 However, on the facts of this case, 1 find that subsection 5 (3) a (ii) C of the CDSA is distinguishable from subsection 5 (3) a (ii) A in that the later does require a specific connection between the offence of PPT and the young person. In the case of the Applicant, proof is required beyond a reasonable doubt that the young person was specifically "used or involved" with the accused in the underlying offence.

75 Such use or involvement is not speculative or potential, it is actual use or involvement of a young person in a particular case proven beyond a reasonable doubt. This can be distinguished from the hypothetical examples raised

by the Applicant. Each of those hypotheticals would be unlikely to meet the test of "use" or "involvement" beyond a reasonable doubt. In each of those examples, use or involvement of the young person concerned is peripheral or marginal in relation to the accused in any manner that might be relevant to sentencing. In that sense the hypotheticals appear to be extreme or too "farfetched" to be useful in evaluating the constitutionality of the impugned provision.

76 In summary therefore, subsection 5 (3) a (ii) C is neither arbitrary nor does it overreach in achieving its legislative objectives. The legislative provision is not fundamentally flawed in achieving its legislative objectives.

77 Considering all of the foregoing, I cannot find that there has been a breach of the rights of the Applicant under section 7 of the Charter.

Issue # 2 - Section 12 of the Charter and sub section 5 (3) a (ii) C of the CDSA

78 I now turn to the second set of issues arising under section 12 of the *Charter*.

79 Section 12 provides as follows:

> *12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment*

Analytical framework

80 Following the test set out in *Nur*, both Counsel agree that the Court must complete a two stage analysis in considering sub section 5 (3) a (ii) C of the CDSA in the context of section 12 of the *Charter*.

(a) Under the first stage, the Court must conduct a "particularized inquiry" and determine the appropriate sentence for the Applicant in the absence of the mandatory minimum sentence now required by subsection 5 (3) a (ii) C and consider that in the context of the two year minimum required by that sub section and the rights of the accused under section 12 of the Charter; and

(b) Under the second stage, the Court must examine the application of the required mandatory minimum sentence in subsection 5 (3) a (ii) C in light of hypothetical scenarios that might reasonably be foreseeable as applicable to others in the day to day application of the law in the context of section 12 of the Charter.

81 In considering both aspects of the procedure outlined in *Nur*, the Court must determine whether or not the applicable mandatory minimum sentence would result in grossly disproportionate sentences either to the Applicant, or others in reasonable hypothetical fact patterns. A finding that a grossly disproportionate sentence could result from the application of subsection 5 (3) a(ii) C of the CDSA may establish grounds for a finding of the potential imposition of cruel and unusual punishment and a breach of section 12 of the *Charter*.

82 With respect to these issues, McLachiin, CJ stated a paras 39 and 77 of the *Nur* decision as follows:

> [39] This Court has set a high bar for what constitutes "cruel and unusual . .. punishment" under s. 12 of the Charter. A sentence attacked on this ground must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: R. v. Smith, [1987] 1 S.C.R. 1045, at p. 1073. Lamer J. (as he then was) explained at p. 1072 that the test of gross disproportionality "is aimed at punishments that are more than merely excessive". He added, "[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation". A prescribed sentence may be grossly disproportionate as applied to the offender before the court or because it would have a grossly disproportionate impact on others, rendering the law unconstitutional.

> [77] In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others. This is consistent with the settled jurisprudence on constitutional review and rules of constitutional interpretation, which seek to determine the potential reach of a law; is workable; and provides sufficient certainty."

83 In the SCC decision of *R v Ferguson*, 2008 SCC 6 at para 14 the court confirmed that a grossly disproportionate sentence is one that is "so excessive as to outrage standards of decency" to the extent Canadians "would find the punishment abhorrent or intolerable":

84 Further, in *R*. v. *Nasogaluak*, 2010 SCC 6 at para. 45 the court confirmed that all courts must give a high level of deference to valid objectives underlying punishment set by Parliament.

The First Stage - A Particularized

Inquiry Position of the Parties

85 Counsel for the Applicant submits that the mandatory minimum sentence arising as a result of the application of subsection 5 (3) a (ii) C of the CDSA results in cruel or unusual punishment to the Applicant based on what would be an applicable sentence for him in the circumstances of this case

86 Specifically, it is submitted that with respect to the first stage of analysis, the imposition of a two year mandatory minimum sentence is grossly disproportionate in the circumstances of the Applicant and the offence currently before the Court.

87 Counsel for the Applicant submits that absent consideration of subsection 5 (3) a (ii) C of the CDSA, the Applicant would be sentenced to a maximum term of imprisonment of six months, with the possibility of a suspended sentence and probation.

88 The Crown submits that the appropriate sentence for the Applicant would be a minimum of 15 to 18 months imprisonment given the aggravating factor of "G"s use and involvement in the underlying offence of PPT.

89 The Crown denies that imposition of the two year mandatory minimum required by sub section 5 (3) a (ii) C of the CDSA is grossly disproportionate to sentence that would otherwise apply to the Applicant and hence, denies that any violations of section 12 of the Charter arise or might arise in reasonable hypothetical situations.

Factors applicable at the First Stage - Particularized Inquiry

90 At the first stage or "particularized inquiry", the Court must consider whether the relevant sentencing provision is grossly disproportionate in its application to the individual offender. At paras 40 to 43 of the *Nur* decision, McLachlin CJ confirmed the approach to be taken by Courts in completing the particularized Inquiry of the first stage of the section 12 analysis:

> [40] In determining an appropriate sentence for purposes of the comparison demanded by this analysis, regard must be had to the sentencing objectives in s. *718* of the *Criminal Code*, which instructs the sentencing judge as follows:
>
> > **718.** The fundamental purpose of sentencing is 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 that have one or more of the following objectives:
> >
> > (a) to denounce unlawful conduct;
> >
> > (b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[41] The sentencing judge must also have regard to the following: any aggravating and mitigating factors, including those listed in s. 718.2(a)(i) to (iv); the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(b)); the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh (s. 718.2 (c)); and the principle that courts should exercise restraint in imposing imprisonment (ss. 718.2(d) and (e)).

[42] In reconciling these different goals, the fundamental principle of sentencing under s. 718.1 of the Criminal Code is that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

[43] It is no surprise, in view of the constraints on sentencing, that imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime: R. v. M. (C.A.), [1996] 1 S.C.R. 500, at para. 80. "Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system" (Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 533, per Wilson J.). As LeBei J. explained in R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433:

> 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. . . . 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. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

91 In *R v Smith*, [1987] S.C.J. No. 36, the Court, at para 54-56, set out a further list of other contextual factors relevant to the concept of gross disproportionality:

[54] In imposing a sentence of imprisonment, the judge will assess the circumstances of the case in order to arrive at an appropriate sentence. The test for review under *s. 12* of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. *Section 12* will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.

[55] In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. *1. Section 12* ensures that individual offenders receive

> punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while *s.1* permits this right to be overridden to achieve some important societal objective.

92 And further in *Morrisey*, Gonthier J. commented on the same issues at paras 27 and 28 as follows:

> [27] In order to properly consider a s. 12 challenge to a punishment, the court must examine all of the relevant contextual factors. No single factor set out in Smith or Goltz is paramount: see Goltz, at pp. 501-2. In Smith, at p. 1073, Lamer J., as he then was, set out some of the relevant factors as follows:
>
> > In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.
>
> [28] In *Goltz*, at p. 500, I also noted that certain other factors were necessary for a full contextual understanding of the sentencing provision. In particular, a court is to consider: the actual effect of the punishment on the individual, the penological goals and sentencing principles upon which the sentence is fashioned, the existence of valid alternatives to the punishment imposed, and a comparison of punishments imposed for other crimes in the same jurisdiction. None of these factors will be "in themselves decisive to a determination of gross disproportionaiity".

Applying the First Stage Factors

93 Both the circumstances of the Applicant and the circumstances of the offence have been addressed earlier in this decision. Taking into consideration the foregoing authorities, the following remaining contextual factors must be specifically considered:

(a) The gravity of the offence.

(b) The relevant penological goals and sentencing principles

(c) The actual effect of punishment of the Applicant.

(d) A comparison of punishments imposed for similar crimes.

(e) The appropriate sentence relevant to the Applicant on the facts of this case this case in accordance with section 718 of the *Criminal Code*, absent consideration of subsection 5 (3) a (ii) C of the CDSA

94 It is acknowledged that none of these contextual factors are determinative and some may not be relevant to a particular case, or the facts of this case: *Morrisey* at para. 28

(a) The gravity of the offence

Crown Submissions

95 The Crown submits that sentencing of the Applicant under s. 5(2) of the *CDSA* is serious matter both in terms of its harm to the community and in terms of the moral blameworthiness of the Applicant's conduct.

96 Specifically, it is submitted that the gravity of a serious crime is further aggravated by the fact that the Applicant involved a young person, "G", in the commission of the offence, thereby exposing that young person to the physical and social ills of the drug trade. It is submitted that that specific conduct by the Applicant had the very real potential to expose a member of a particularly vulnerable segment of our society to the harm and degradation engendered by the drug trade.

97 The Crown further maintains that the personal, societal, and economic harms associated with the distribution of illicit drugs are extremely serious. Crown notes that the substances listed in Schedule I of the *CDSA* include the most dangerous and harmful illicit drugs in Canadian society, such as cocaine, and that those drugs pose severe health risks to the user. It is submitted that these well-documented risks include the risk of death due to overdose, and serious adverse health consequences of prolonged use due to addiction. At an individual level. Crown maintains that illicit drugs are a source of untold misery for users and their families. Further it is submitted that the illicit drug trade is itself an extremely destructive phenomenon with immense social and economic costs.

98 Crown notes the comments of Cory, J. in *R v Pushpanathan*, [1998] 1 S.C.R. 982 at paragraph 89:

> "[89] The costs to society of drug abuse and trafficking in illicit drugs are at least significant if not staggering. They include direct costs such as health care and law enforcement, and indirect costs of lost productivity."

99 The Crown makes reference to more recent statistics from the Canadian Centre for Substance Abuse [2002] showing that the social costs associated with illicit drug abuse continue to rise. In 2002, there were 318,409 acute care hospital days and 1,455 deaths attributable to illicit drug use in Canada, and the total cost associated with illicit drug abuse in Canada had risen to $8.2 billion per year.

100 The Crown also relies on *R v Malmo-Levine*, 2000 BCCA 335 and Braidwood J.A.'s examination of the history of drug legislation in Canada led him to conclude at paragraphs 81 and 96 that the "overarching goal of stamping out drug trafficking has remained somewhat constant" and that Parliament's efforts to combat drug trafficking "have only grown more intense over time".

101 The submission of Crown is that Parliament's approach to the crime of drug trafficking is entirely consistent with the societal consensus that dealing in illicit drugs is by its very nature morally blameworthy conduct

102 The Crown maintains that those who engage in drug trafficking bear considerable moral responsibility for the harmful effects of illicit drugs on individual users and on the very fabric of Canadian society as a whole. It is specifically submitted that the conduct of commercial drug dealers who are not themselves users and who seek to profit from the addiction and misery of others is particularly blameworthy. Furthermore, the Crown asserts that while addicted traffickers who sell drugs to fund their own drug abuse may be viewed as somewhat less predatory than commercial traffickers, their conduct is every bit as socially destructive and harmful to the safety and integrity of our communities.

103 Finally with respect to consideration of the gravity of section 5(2) CDSA offences which are also characterized by the use or involvement of young people, the Crown submits that such young people are acutely susceptible to peer pressure and negative social influences, and exceedingly vulnerable to the dangerous effects of illicit drugs.

Submissions of the Applicant

104 Counsel for the Applicant acknowledges that a person engaging in the drug trade spreads misery and addiction. However, it is submitted that what is really at issue is not the gravity of the underlying offence of PPT, but rather the gravity of the "circumstance" which gives rise to the minimum mandatory sentence. Specifically Counsel for the Applicant submits that it is not the PPT offence itself that triggers the s.12 analysis but rather the gravity of the circumstances of using the services or involving a person under 18.

105 Counsel for the Applicant relies on the comments of Doherty JA in Nur, Ontario Court of Appeal 117 O.R. (3d) 401 at para. 81:

> "[t]he gravity of the offence is measured by reference to the essential elements of the offence that the Crown must prove to establish guilt and not by the circumstances surrounding the commission of the offence in the particular case before the court" (emphasis mine).

He continues at para. 83 to state:

> "[t]he seriousness of a crime is the product of the harm targeted by the elements of the crime and the moral culpability required to establish guilt for the crime.
>
> The greater the harm and the higher the moral culpability, the more serious the crime."

106 Counsel for the Applicant submits that since the "circumstances" in this case can be triggered absent mens rea by accident and inadvertence, the gravity of the circumstances is very low. When the lack of subjective awareness of the impugned consequences is combined with the lack of any tangible harm to the person under 18, the Applicant submits overall gravity of the offence is much reduced.

(b) Penological Goals and Sentencing Principles

Crown Submissions

107 The Crown submits that s. 10(1) of the *CDSA* provides that the "fundamental purpose" of sentencing for offences under Part I of the *Act* is to "contribute to the respect for the law and the maintenance of a just, peaceful and safe society", while encouraging rehabilitation and treatment where appropriate, and "acknowledging the harm done to victims and to the community".

108 The Crown maintains that this statement of purpose must be read together with the more general principles of sentencing set out in s. 718 to 718.1 of the *Criminal Code*.

109 The Crown submits that the particular offence in issue in this case concerns possession of a Schedule I substance for the purpose of trafficking, it is specifically submitted that Courts across Canada have consistently held that the principles of denunciation and deterrence are paramount in cases involving trafficking of so-called "hard drugs" such as cocaine. It is acknowledged by the Crown that other sentencing principles, including rehabilitation, may be taken into account by Courts in sentencing, however, it is submitted that such principles will generally not justify a sentence that does not adequately serve the principles of denunciation and deterrence.

110 The Crown further submits that through the introduction of the minimum two year jail term in subsection. 5 (3) a (ii) of the *CDSA*, Parliament has made a policy choice to give priority to the objectives of denunciation and deterrence when sentencing offenders for trafficking in particular categories of controlled substances, punctuated by certain aggravating features. One such aggravating circumstance arises where the offender uses the services or otherwise involves a young person in the offence as set out in subsection. 5 (3) a (ii) C. The Crown submits that Parliament has in effect directed that for this particular offence, with this particular aggravating feature, the principles of denunciation and deterrence must be given priority, at least to the extent of requiring a minimum two year jail sentence.

111 It is the position of the Crown that the legislation in question only precludes the imposition of a lesser sentence based on other sentencing principles such as rehabilitation and individual deterrence in the case of drug trafficking offences aggravated by one of the statutory factors listed in subsection. 5(3) a (i) or (ii). In other words, sentencing courts retain the ability to consider and weigh all the codified sentencing objectives in s. 10(1) of the *CDSA* and ss.718 to 718.1 of the *Criminal Code* in sentencing drug offenders whose conduct does not involve any of the aggravating factors listed in subsection 5 (3) a (i) or (ii).

112 Crown submits that jurisprudence arising under section 12 of the *Charter* affirms Parliament's role in making policy choices about the weight attached to various sentencing objectives in relation to particular offences. *R. v.*

Francis, 2008 BCCA 309 at para.12; *R*. v. *Rastgoei*, 2008 BCCA 242 at para.44, 49, 51; *R. v. Kosanouvong*, 2002 MBCA 144 at para.4; *R. v. Shawile*, 2012 SKCA 51 at para.12; *R. v. Knickle*, 2009 NSCA 59 at para.26-27; *R. v. Lucia*, 2010 ONCA 533 at para.10, *R. v. Francis* at para. 13; and *R. v. Szczerba*, 2004 ABCA 301 at para.8.

113 It is submitted that Parliament's sentencing policies are entitled to deference unless shown to produce sentences that are so "grossly disproportionate" as to offend standards of decency.

114 Crown further submits that the above noted jurisprudence also recognizes that s. 12 of the *Charter* does not require Parliament to enact sentencing provisions which give equal weight to all sentencing objectives in all circumstances.

115 In other words, Crown submits that Parliament is not constitutionally compelled to enact sentencing provisions which "simultaneously pursue all of the traditional sentencing principles".

116 In the Crown's submission, a sentencing provision which "pursues the sentencing objectives of general deterrence, denunciation, and retributive justice more than the principles of rehabilitation an specific deterrence" does not, by that reason alone, run afoul of the constitutional guarantee against "cruel and unusual punishment" in s. 12 of the *Charter*

Submissions of Counsel for the Applicant

117 Counsel for the Applicant submits that it is necessary to analyze the penological goals and sentencing principles on which the sentence is fashioned in order to determine whether Parliament was responding to a pressing problem in enacting the mandatory minimum: *R*. v. *Morrisey*, 2000 SCC 39

118 It is further submitted that cocaine drug use by young persons has been decreasing and declining. Counsel for the Applicant specifically notes the Legislative Summary of Bill C-10, section 4.1.2 wherein Health Canada had summarized the major findings from its latest survey of drug use by Canadians, in part as it related to cocaine, as follows:

> Among Canadians 15 years and older, the prevalence of past-year cocaine or crack decreased from 1.9% in 2004 to 1.2% in 2010.
>
> Among youth aged 15 to 24 years, past-year use of at least one of five illicit drugs (cocaine or crack, speed, hallucinogens, ecstasy, and heroin) decreased from 11.3% in 2004 to 7.0% in 2010.
>
> The rate of drug use by young people 15 to 24 years of age remains much higher than that reported by adults 25 years and older; it is three times higher for cannabis use (25.1 % versus 7.9%), and almost nine times higher for past-year use of any drug excluding cannabis (7.9% versus 0.8%); (emphasis mine).

119 Counsel for the Applicant further submits that the Legislative Summary to Bill C- 10 continues under section 4.1.2 as follows:

> The Canadian Centre on Substance Abuse (CCSA) has also published a document outlining the relationship between the perceived seriousness and the actual costs of substance abuse in Canada. The study found that, while the total social costs associated with alcohol are more than twice those for all other illicit drugs, the public consistently rated the overall seriousness of illicit drugs as higher in the Canadian Addiction Survey, The reasons for this misperception may relate to the fact that alcohol is a legal, socially accepted product that is regularly used by the vast majority of Canadians. While over 90% of Canadians have direct, personal experience with alcohol, only 3% of CAS respondents reported past-year use of the five most popular illicit drugs, so perceptions of risk will likely be inflated for these substances due to the unfamiliarity factor. The CCSA also points to the police, concerned citizen groups, political leaders and policy makers as those involved in amplifying the perceptions of the risks associated with illicit drug abuse.

120 Counsel for the Applicant maintains that the foregoing stands in stark contrast to subsection 5(3) a (ii) C of the CDSA. Counsel submits that this subsection was not enacted as a consequence of extensive study by the Federal Government but rather in the context of omnibus legislation was enacted absent rigorous parliamentary committee review and was implemented in in 2011.

121 Under the circumstances, Counsel for the Applicant submits that an emphasis on general deterrence, denunciation and retribution as reflected in the two year minimum sentence under sub section 5 (3) a (ii) C of the CDSA is simply not justified.

(c) <u>The actual effect of punishment of the Applicant.</u>

122 Both Counsel were asked to address the actual effect of punishment on the Applicant. There is a joint submission on the following concerning the most likely actual effect of punishment on the Applicant:

1. In British Columbia, a male offender sentenced to a penitentiary term of imprisonment is first sent to the Regional Reception and Assessment Centre ("RRAC") at Pacific Institution in Abbotsford, for intake assessment by Correctional Services of Canada ("CSC") staff. It is not possible to know where a particular inmate will be required to serve his sentence until the intake assessment process is completed.
2. During the assessment period, information is gathered about the inmate and the offence from police, courts, victims, family members and the inmate. With this information, CSC staff develop a correctional plan. CSC staff also assess the inmate's security level, based on institutional adjustment, escape risk, and risk to the public in event of escape.
3. Once CSC staff at RRAC assess the inmate's security level, the inmate is placed in an appropriate correctional institution. Federal correctional facilities for male inmates are categorized as minimum security, medium security, or maximum security, or multi-level institutions.
4. There are six federal correctional institutions for male inmates in British Columbia:
   (a) William Head Institution, located in Victoria, is a minimum security facility;
   (b) Kwtkwexwelhp Healing Village, located in Harrison Mills, is a minimum security facility for male aboriginal offenders;
   (c) Mission Institution, located in Mission, is a multi-level institution, housing both a medium security facility, and a minimum security facility formerly known as Ferndale;
   (d) Matsqui Institution, located in Matsqui, is a medium security facility;
   (e) Mountain Institution, located in Agassiz, is a medium security facility; and
   (f) Kent Institution, located in Agassiz, is a maximum security facility.

123 There is no issue that the Applicant's roots and family are linked to the Duncan and Nanaimo area. The is also no dispute that a sentence of two years less a day would be served in a provincial facility, while a greater term of custody such as that required by subsection 5 (3) a (ii) C of the CDSA would be served in a federal institution some distance from the Applicant's roots and family supports.

(d) <u>Comparison of punishments imposed for similar crimes</u>

<u>Submissions of the Applicant</u>

124 Counsel for the Applicant submits that section 150.1(5) of the Criminal Code makes reference to the following

sections relating to sexual offences involving minors, none of which exceed a minimum mandatory sentence of 1 year for an indictable offence;:

a) Section 153 - "Sexual Exploitation" - MMS on summary conviction is 90 days and an MMS on indictment is 1 year.

b) Section 159 - "Anal Intercourse" hybrid offence with no MMS.

c) Section 170 - "Parent or Guardian Procuring Sexual Activity", procure is part of the definition of counsel in s. 22(3) which states "counsel includes procure, solicit or incite." An MMS of 6 months to 1 year jail applies.

d) Section 171 "Householder Permitting Sexual Activity" accused knowingly permits a minor to resort to or be in the premises for the purpose of engaging in sexual activity. If the minor is under 16, the minimum punishment is 6 months jail, if the minor is between 16 and 18 the minimum punishment is 90 days jail.

e) Section 172 - "Corrupting Children" - prosecution under this section requires consent of the Attorney General and is predicated on the corruption being in the child's home. The corruption includes adultery, sexual immorality, drunkenness or any other form of vice. There is no mandatory minimum sentence, however, a conviction attracts a jail sentence not exceeding two years.

125 Counsel for the Applicant further submits that section 150.1(4) references additional offences where the complainant is less than 16 years old. Counsel submits that none of these offences carry a two year mandatory minimum sentence until the sex offence involves use of a weapon in a sex assault or reaches the level of an aggravated sexual assault:

a) Section 151 - "Sexual Interference" requires the accused to touch a minor complainant. A mandatory minimum sentence of 1 year jail by indictment and 90 days jail on summary conviction applies;

b) Section 152 - "Invitation to Sexual Touching" requires the accused to invite, counsel or incite a minor complainant, the terms "counsel" and "incite" are both defined in s. 22(3) of the CCC. A mandatory minimum sentence of 1 year jail by indictment and 90 days jail on summary conviction applies.

c) Section 160(3) - "Bestiality" requires the accused to commit the offence "in the presence" of a minor or "incite" a minor into committing the offence and imposes a mandatory minimum sentence of 6 months jail on summary conviction. A mandatory minimum sentence of 1 year jail by indictment and 6 months jail on summary conviction applies.

d) Section 173(2) - "Indecent Acts" offender for a sexual purpose exposes genitals to a person under the age of 16. Mandatory minimum sentences of 30 days apply on summary conviction or 90 days by indictment.

e) Section 271 - "Sexual Assault" of a minor under 16 years on summary conviction the mandatory minimum sentence is 90 days, if by indictment the mandatory minimum sentence is 1 year.

f) Sections 272 "Sex assault with a weapon" and 273 "Aggravated sexual assault" are also included in s. 150.1 and attract a higher mandatory minimum sentence of 5 years.

126 Counsel for the Applicant submits that penalizing the consequences of the sexual abuse of minors is critical to the protection of minors and the deterrence and denunciation of adults who would physically harm a person under 18. Counsel further submits that penalizing a "circumstance "that involves a minor, without the possibility of a mistake of fact defence that would negate mens rea, and subjecting that person to two years of Federal imprisonment, is much more serious.

Submissions of Crown

127 The Crown submits that the Supreme Court of Canada in *R v Goltz* [1991] 3 S.C.R. 485 at para 16 has made it clear that the s. 12 analysis must focus on the particular provision under which the offender is to be sentenced, not all of the sentencing provisions in the legislation.

128 Thus it is submitted by Crown that the Court in *Goltz* limited its analysis to the particular manifestation of the offence that triggered the mandatory minimum sentence in the case before it, without considering other manifestations of the same offence that could result in the imposition of the same mandatory minimum sentence.

129 Similarly, in *R v Brown* [1994] 3 S.C.R. 749, when considering the constitutionality of a mandatory minimum jail sentence for use of a firearm in the commission of an indictable offence, the Court limited its analysis to use of a firearm in the commission of a robbery, refusing to consider the same mandatory minimum penalty provision in relation to other indictable offences.

130 The Crown submits that the Court need not consider other provisions or offences that would trigger the same or similar two year minimums. Specifically, it is submitted that the Court need not consider the imposition of a two year minimum jail term for trafficking in Schedule II substances like marihuana.

131 Similarly, the Crown submits that the Court need not consider the constitutionality of the two year minimum based on the other aggravating factors listed in s. 5(3)(a)(ii)(A) or (B).

(e) <u>The appropriate sentence relevant to the Applicant on the facts of this case this case in accordance with section 718 of the *Criminal Code*, absent consideration of sub section 5 (3) a (ii) C of the CDSA.</u>

<u>Submissions of Counsel for the Applicant</u>

132 Counsel for the Applicant notes the circumstances of the applicant, as outlined above confirming that he is before the court at 22 with a single adult conviction for a non cognate offence.

133 The aggravating circumstances relevant to sentencing referenced by Counsel for the Applicant include the following:

(a) Admitted involvement in a commercial Dial-a-dope operation;

(b) The addictive nature of cocaine;

(c) The fact that the Court found that the Applicant used the services and involved a person under the age of 18 in committing the offence of PPT.

134 The mitigating circumstances noted by Counsel for the Applicant include the following:

(a) The virtual lack of a prior adult criminal record for the Applicant;

(b) No cognate offences on his youth or adult record;

(c) At 20 years of age on the date of the offence, the Applicant was still very young;

(d) A relatively low level dial a dope operation involving and a small amount of cocaine, a single package in the Applicant's hand and 14 on his person at the time of his arrest.;

135 Counsel for the Applicant further submits that:

(a) the Applicant became estranged from his drug addicted parents at age 13/14, and was left to fend independently for himself. At 16 years of age he finally received assistance in the form of a Youth Agreement which helped to provide for his living needs for 2 years;

(b) notwithstanding his need for Youth Agreement assistance, his troubled family life and the fact that he was held back one year and made to repeat grade 10, the Applicant still managed to graduate grade 12 from Chemainus High School;

(c) once the Applicant graduated from high school, and he no longer qualified for Youth Assistance on his 18th birthday, he became financially strapped. It is submitted that the Applicant as a vulnerable young man with no resources, estranged from his family, and lacking adult guidance was eventually preyed on by an adult friend of his drug addicted father who introduced the Applicant to the drug trade;

(d) the Applicant has been on strict bail conditions since August 2014,10 months, including a 6 p.m. curfew, and has not breached the terms of his release;

(e) the Applicant is presently living in Nanaimo with his grandmother, working and now leading a stable and productive life. As a result of this offence the Applicant has reconnected with his mother (who has now been clean from drugs for many years);

(f) the Applicant has entered a guilty plea, has expressed remorse and has the support of his mother and grandmother.

136 Counsel for the Applicant maintains that the appropriate range of sentence before the implementation of the mandatory minimum sentence under sub section 5 (3) a (ii) C was 6-9 months, with most decisions resulting in 6 months imprisonment.

137 It is further submitted that a suspended sentence, while unusual, may also be available in the circumstances of the Applicant. Counsel for Applicant did not, however, advance specific submissions in connection with "exceptional circumstances" that might support such a sentence as most recently considered by the BC Court of Appeal in *R v Carillio*, 2015 BCCA at 192.

138 Counsel for the Applicant submits that a 6 month sentence is well within the range based on authorities including R. v, *Ali*, 2010 BCCA 4, *R*. v. Kumar, 2013 BCSC 2171 and *R. v. Cisneros*, 2014 BCCA 154,R. *v. Dickey*, 2015 BCSC 191 and R. *v. Voong*, 2014 BCPC 211.

139 Finally with respect to this factor, Counsel for the Applicant submits that absent proof of *mens rea* as part of the aggravating factor of using or involving a young person, no additional penalty by way of incarceration should be applicable to this range of sentences.

Submission of Crown on sentence

140 The Crown submits that section 5(2) of the CDSA creates a serious offence punishable by a maximum sentence of life in prison.

141 Aggravating circumstances identified by Crown as being relevant to sentencing in this case include:

(a) The Applicant's use and involvement of "G", a young person, in the commission of the subject offence;

(b) The fact that the substance in issue with respect to the subject offence, cocaine, is a highly addictive and dangerous drug;

(c) The Applicant was part of a dial dope operation of some sophistication and activity in Duncan;

(d) There is no evidence that the Applicant was working in illicit drug sales to support a drug addiction, but rather a strong inference can be drawn that the Applicant was simply a commercial distributor of illicit drugs for profit; and

(e) There is no evidence that the Applicant had any other legitimate employment or means of support for the period preceding his arrest

142 The Crown's position is that absent consideration of the aggravating factor associated with the use or involvement of a young person in the subject offence, the appropriate sentencing range would be between 6-12 months imprisonment.

143 Although the Crown submitted no specific authority concerning the impact on sentencing of circumstances similar to the use or involvement of "G", the position is that such circumstances would support a sentence in the range of 15 -18 months for the Applicant.

144 In support of this position, Crown relies on *Pushpanathan* per Cory J. in dissent at paras. 89-91; *R. v. Williams* (1996), 75 B.C.A.C. 220 (C.A.); *R. v. M.Q.*, 2009 BCPC 211; *R. v. Ahmed*, 2001 BCCA 504; *R. v. Tran*, 2007 BCCA 613; *R. v. Lloyd*, 2014 BCCA 224, leave to appeal granted [2014] S.C.C.A. No. 304; *R. v. Ash*, 2010 BCCA 604; *R. v. Ladret*, 2012 BCCA 401 ; R *v. Ali*, 2010 BCCA 4 and *R. v. Cisneros*, 2014 BCCA 154.

145 In addition, the Crown relies on the following further authorities for the principles underlying sentencing for dial-a-dope drug offences: *R. v. Barrick*, 2012 BCCA 83; R. v. Greyeyes, [1997] 2 S.C.R. 825; *R. v. Hernandez*, 2012 BCSC 238, *R. v. McIntyre*, 2012 SKCA 111, *R. v. Villanueva*, 2007 ONCJ 87; *R. v. Harper*, 2003 YKSC 30; *R. v. Mulumba*, 2011 ABPC 249.

146 However, it is acknowledged by Crown counsel that none of the authorities referenced by the Crown specifically dealt with the effect on sentencing of the aggravating factor engaged in this case, that of using or involving a young person in the commission of an offence under section 5(2) of the CDSA.

Does the Mandatory minimum sentence contained in s. 5(3)(a)(ii)(A) of the *CDSA* breach s. 12 of the *Charter* in the Applicant's case?

147 I have considered each of the contextual factors outlined above. My findings and analysis of the same are as follows.

Gravity of the Offence

148 A conviction of possession of restricted or controlled drugs for the purposes of trafficking is unquestionably a serious offence. Parliament has chosen to attach to such a conviction the maximum sentence of life imprisonment. Few other criminal offences in Canadian law attract such severe potential sanctions. Subsection 5 (3) a (ii) C of the CDSA requires to Court to impose a minimum sentence of two years imprisonment if the aggravating circumstance of the accused's "use or involvement" of a young person is established. As a result a new "floor" has been established for sentencing of PPT offences characterized by these circumstances.

149 Prior to the amendment in subsection 5 (3) a (ii) C, a suspended sentence and probation were dispositions technically available to the Court in "exceptional circumstances". *R* v *Carillo*, 2015 BCCA 192. However, with the removal of that sentencing option, the consequences of a conviction engaging the aggravating factor in subsection 5 (3) a (ii) C becomes more serious.

150 Notwithstanding this fact, I do not find that the gravity of the underlying offence of PPT has changed. Gravity is measured by reference to the essential elements of the offence: *Nur*, Doherty JA at para 81.

151 With respect to the absence of a requirement for proof of mens rea prior to the imposition of the increased sanction under subsection5 (3) a (ii) C of the CDSA, I find that such absence is not a relevant consideration. As noted earlier in this decision, mens rea must established beyond a reasonable doubt prior to a finding of guilt on the substantive offence. The absence of the requirement of such proof in connection with the application of subsection

5 (3) a (ii) C does not reduce the gravity of the offence of PPT, nor the significance of the aggravating circumstance itself.

Penological goals and sentencing principles

152 With respect to consideration of penological goals and sentencing principles, the general principles set out in subsection. 10(1) of the *CDSA* confirm that with respect to convictions arising under Part 1 of that Act, the "fundamental purpose" of sentencing is to "contribute to the respect for the law and the maintenance of a just, peaceful and safe society", while encouraging rehabilitation and treatment where appropriate, and "acknowledging the harm done to victims and to the community".

153 There can be no doubt that with the introduction of the minimum two year jail term in subsection. 5(3)(a)(ii) of the *CDSA*, Parliament has made a clear and unequivocal policy choice to give priority to the objectives of denunciation and deterrence when sentencing offenders for trafficking in particular categories of controlled substances, where the specific aggravating factor set out in set out in s. 5 (3) a (ii) C have been established.

154 Subsection 10(1) of the CDSA when read together with the more general principles of sentencing set out in s. 718 to 718.1 of the *Criminal Code*, and sub section 5 (3) a (ii) C of the CDSA confirms Parliament's intention to give priority to the sentencing principles of denunciation and deterrence in order to protect society with the imposition of minimum terms of incarceration. In *Nur*, the majority of the Court noted that there have been long standing doubts about the effectiveness of incarceration as a deterrent and accepted that the government "had not established that mandatory minimum terms of imprisonment act as a deterrent against gun-related crimes" (para. 113). However, the Court did accept that, notwithstanding the "frailty" of the connection between a mandatory minimum sentence and deterrence, there was a rational connection between a mandatory minimum term of imprisonment and the sentencing goals of denunciation and retribution.

155 With respect to Crown's submission that Parliament is entitled to deference with respect to the establishment of such policy choices in the field of criminal law I find that the deference accorded consideration of Parliament's legislative acts must be tempered by consideration of whether or not that clear expression of Parliament's intention conflicts with the provisions of section 12 of the Charter of Rights and Freedoms and the constitutional rights of the Applicant The principle of deference will always require consideration of any relevant constitutional principles applicable to Parliament's legislative authority. Such is the case with respect to consideration of subsection 5 (3) a (ii) C of the CDSA.

Effects of punishment on the Applicant

156 I next turn to consideration of the effects of punishment on the Applicant.

157 Applying sub section 5 (3) a (ii) C of the CDSA to the facts of this case, the Applicant would receive a minimum federal custodial sentence of 2 years imprisonment. The Crown, however, seeks a sentence of 28 months imprisonment.

158 Both are sentences that would be served in Federal institutions some distance from the Applicant's home in the Duncan area, as confirmed by the joint submission outlined at paragraph 122 of this decision.

159 Serving a sentence in a federal institution would, I find, affect the ultimate rehabilitation of the accused in light of his removal from local family support systems.

160 Although rehabilitative programs and assistance while in custody would be available to the Applicant, serving a sentence in a Federal institution, the loss of local support would, I find, negatively affect the Applicant.

Punishments imposed for similar crimes

161 In considering punishments imposed by law for similar crimes, I find that Parliament has established a wide range of sanctions, including mandatory minimum sentences, for several offences involving minors. The range of such sentences reflects policy choices made by Parliament to impose punishment for convictions in a widely varying circumstances involving minors.

162 I find that the mandatory minimum sentence required by sub section 5 (3) a (ii) C is at the higher end of the range of other sanctions imposed in cases involving minors such as sections, 151, 152,153,170, 171 172 and 173(2).

163 As such, it is clear that Parliament in enacting sub section 5 (3) a (ii) C of the CDSA has made a policy choice to significantly increase the penalties to be imposed where a youth is used or involved in trafficking of PPT offences.

164 However, the Supreme Court of Canada in *Goltz and Brown* has confirmed that consideration of punishments for other indictable matters such as those noted by Counsel for the Applicant has limited bearing on offences under the CDSA and a section 12 analysis.

165 Accordingly, I find that this contextual factor must be limited in the section 12 analysis to consideration of the other mandatory minimums imposed under the CDSA, specifically subsections 5 (3) a (i) as follows:

> (3) Every person who contravenes subsection (1) or (2)
>
> * (a) subject to paragraph (a. *1*), if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life, and
>
> * (i) to a minimum punishment of imprisonment for a term of one year if
>
> * (A) the person committed the offence for the benefit of, at the direction of or in association with a criminal organization, as defined in subsection 467.1(1) of the *Criminal Code*.
>
> * (B) the person used or threatened to use violence in committing the offence,
>
> * (C) the person carried, used or threatened to use a weapon in committing the offence, or
>
> * (D) the person was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years, or

166 I note that the minimum punishment imposed under subsection 5 (3) a (ii) C is double that imposed under the factors outlined in subsection 5 (3) a (i), including use of a weapon.

167 However, both Counsel have noted the evolving jurisprudence concerning the constitutionality of the mandatory minimums imposed under subsection 5 (3) a (i) of the CDSA. As such, the existence of the differing minimum penalties under these subsections of the CDSA while relevant, is of limited assistance as a contextual factor in considering subsection 5 (3) a (ii) C of the CDSA, section 12 of the Charter and the rights of the Applicant

The Appropriate sentence for the Applicant absent consideration of subsection 5 (3) a (ii) C of the CDSA

168 The final contextual consideration is the appropriate sentence for the Applicant.

169 The appropriate sentence for the Applicant absent application of subsection 5 (3) a (ii) C will always require a balancing of the circumstances of the offence, offender, aggravating factors and mitigating circumstances taking into consideration the specific provisions of section 718 of the CC and section 10 of CDA

170 Greyell, J. in *Dickey*, summarized the role of the court in sentencing for dial a dope convictions at paras 83- 86 as follows:

> "[83]Section 718 of the Code sets out the fundamental purpose of sentencing as being 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. A sentence must be proportionate both to the gravity of the offence and to the degree of responsibility of the offender. Section 718 of the Code sets out a number of objectives a sentencing judge must consider when imposing sentence. Those objectives are to denounce unlawful conduct; to deter the offender and other persons from committing offences; to separate offenders from society, where that is necessary; to assist in rehabilitating offenders; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community.
>
> [84] Counsels' reliance on the authorities I have set out above is particularly important to two principles set out in the Code: proportionality (s. 718.1) and the principle that a sentence "should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (s. 718.2 (b)).
>
> [85] Section 10 of the CDSA contains a statement of sentencing principles to be followed by the court in determining sentences relating to offences under that Act:
>
> Purpose of sentencing
>
> 10. (1) Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.
>
> [86] There is little doubt courts across Canada have considered the offence of trafficking in Schedule I drugs, particularly in dial-a dope-operations, to be a serious offence where denunciation and deterrence must be considered as the primary goals of sentencing.

171 And again, with reference to the sentencing principles to be applied in dealing with prosecutions under section 5(2) of the CDSA Groberman, JA *in Cisnernos*, commented at para 10 as follows:

> "[10] Denunciation and deterrence are particularly important sentencing objectives in dial-a-dope cases."

172 And further at paragraph 14 of *Cisneros*, Groberman, JA said:

> [14] I agree with the Crown's assessment that the ordinary sentencing range for a first offender in a crime of the nature involved in this case is approximately 6-9 months' imprisonment. Even before the option of giving a conditional sentence of imprisonment for such offences was removed by amendment to the Criminal Code, such sentences were very much the exception.

173 And further most recently in *R V Fargo*, 2015 BCCA 187 the Court commented with respect to the range of sentences applicable to dial a dope operations at paragraph 17 as follows:

> [17] For that reason, it was an error for the sentencing judge to suggest that his sentencing discretion was constrained. His discretion was not fettered by the judicial creation of a class of offence and it was essential to consider not only the gravity of the offence but the offender's degree of responsibility. It was important to determine whether the offender's circumstances could fairly be distinguished from those considered in *R. v. Cisneros*, 2014 BCCA 154. In my view, they could be distinguished. *Cisneros, R. v. Tran*, 2007 BCCA 613, and the long line of cases discussed in *Tran* that are said to establish a clear appropriate range of sentences (including *R. v. Le*, 2002 BCCA 98; *R. v. To* (1998), 109 B.C.A.C. 242; *R*. v. *Ahmed*, 2001 BCCA 504; *R. v. Franklin*, 2001 BCSC 706; *R*. v. *Nguyen*, 2003 BCCA 686; and *R. v. Chang*, 2002 BCCA 644), do

> not establish a categorical approach to sentencing in dial-a-dope cases. They describe a range of appropriate sentences in straightforward cases, typified by involvement in the enterprise for profit, where the offender's involvement is particularly morally blameworthy.

174 The circumstances of each offender in each of the authorities cited by both Crown and Defence Counsel varies greatly and the Court must consider the particular circumstances of this offence and offender in the context of those authorities.

175 Having considered the foregoing authorities and submissions, I am satisfied that the sentencing range for a first offender with respect to the offence before the Court would be between 6 and 9 months imprisonment. As well, the sentencing objectives applicable should be denunciation and general deterrence.

176 On the facts of this case, the Applicant was young at the time the offence was committed, 20 years of age. The Applicant had single adult conviction for failing to appear in court resulting in a $150.00 fine. There is no evidence of any cognate conviction adult or youth and as such, the Applicant is certainly a first offender with respect to the CDSA.

177 The Applicant was clearly struggling at the time of his arrest and had resorted to the commercial sale of illicit drugs to meet his needs. There is no evidence that the Applicant was selling drugs to provide for an addiction, but rather the motivation for sale appears to have simply been financial gain..

178 The Applicant entered a guilty plea prior to trial to a single count of PPT under the CDSA. Through Counsel the Applicant has expressed his remorse and has now moved to more legitimate forms of employment with a more stable family life.

179 In all of the circumstances taking into account section 718 of the Criminal Code and section 10 of the CDSA and all of the mitigating and aggravating factors, but for the use and involvement of "G", I find that the Applicant would ordinarily be sentenced at the low end of the range, six months' imprisonment. A conditional sentence order is, of course, not applicable to this conviction and both Counsel acknowledge that many of the authorities referred to in submissions relate to the period when such sentences were technically available for such convictions. As a result, these authorities are of reduced relevance to these proceedings.

180 A suspended sentence and probation in any form would not adequately address the two key sentencing objectives of denunciation and general deterrence in the circumstances relevant to the Applicant although technically available for such cases: *R v Fargo supra* absent consideration of subsection 5 (3) a (ii) C of the CDSA.

181 Furthermore, there were no "exceptional circumstances" as defined in *Carilfo* relating to the Applicant that might justify such a departure from the usual range of sentences applicable to dial a dope convictions.

182 The added aggravating factor of using or involving "G" would, even absent subsection 5 (3) a (ii) C of the CDSA clearly warrant a term of custody beyond the minimum end of the usual range to specifically address the sentencing objectives of denunciation and deterrence with respect to those actions of the Applicant.

183 Although no specific authorities have been identified linking the aggravating factor of using or involving "G" to an increased custodial sentence, there are a number of considerations relevant to the Applicant's actions in involving "G", a young person, in the commission of the offence of PPT which are relevant in determining the appropriate increased penalty applicable.

184 First, the use or involvement of "G" in providing transportation services was, according the expert evidence admitted during the *Gardiner* hearing, an integral part of sophisticated dial a dope operations. "G" was embroiled in assisting the Applicant complete his sales run prior to the arrest. The evidence confirmed that dial dope operations can extend from repeated sales by foot to more sophisticated delivery and sales arrangements. As this case

involved a vehicle, it can best be described as a midrange involvement as "G" was actively involved in assisting the Applicant, and indirectly the cocaine, to arrive at the agreed sales point.

185 Second, the use or involvement of "G" did not actually involve "G" in holding or possessing the cocaine seized from the Applicant nor was "G" in possession of the phone used to arrange the drug sale. It is quite easy to contemplate circumstances involving the direct use or involvement of a young person in holding illicit drugs or actually fronting the sales on behalf of an accused. In such circumstances, the weight of the facts associated with this aggravating factor would be greater than the circumstances relevant to a person in the Applicant's situation. The present case, therefore, is at the lower end of the weight relevant this aggravating factor when considering the potential involvement with respect to possession of the cocaine itself.

186 Third, the effect of the young person must be considered. At the lower end of the range, a young person of 16 or 17 years of age might be asked to serve as a lookout or sentry from a distant vantage point to safeguard a dial a dope sale. An accused arrested in such circumstances might impact the young person concerned only indirectly if arrested. At the mid-range, the circumstances confronting "G" arise where an accused is arrested resulting in an arrest for the accompanying young person as well. At the high end of the range of use or involvement, a distant adult might direct and control a very young person, perhaps 10 or 11 years of age, to hold, negotiate and sell illicit drugs by phone. The effect on a young person in such circumstances is unquestionably more serious than the furtive sentry who is perhaps never actually arrested or otherwise embroiled directly in the arrest of the accused . The weight accorded such facts in considering the aggravating factor of using or involving a young person would be more significant in sentencing than the circumstances of the Applicant in this case.

187 Overall in considering the use or involvement of "G" in this case, I find that such acts on the part of the Applicant lay at the mid-range in terms of the potential scope of use or involvement of a young person, the related impact on that young person and ultimate weight in sentencing as an aggravating factor.

188 In applying section 718 of the Criminal Code, the Court must, consider the specific nature of each aggravating factor. In this case, the facts support proof of an important aggravating factor, the use and involvement of "G", however, I find that on the facts of this case, such use or involvement was not at the most egregious level of potential use or involvement but rather at the mid-range of such conduct.

189 The Crown specifically relied on *R v Ahmed* and *R v Williams* as authority for the proposition that a jail term of 15 -18 months would be appropriate on the facts of this case. I find, however, that both cases are distinguishable.

190 In *Ahmed*, the accused was convicted after a trial of six counts of the sale of cocaine to an undercover officer over the course of a month. The sales in question were made by Mr. Ahmed as a clerk in a convenience store which was near a school in a residential neighbourhood with a persistent drug problem.

191 The Applicant has entered a guilty plea to a single count of PPT in the context of an admitted dial a dope operation using a young person.

192 In *Williams* the conviction reviewed by the Court of Appeal was to possession of LSD for the purpose of trafficking and possession of marijuana. The accused in that case had a minor Youth Court Record, was 19 years old at the date of the offences and was engaged in selling the illicit drugs within a school in significant quantities. The case in distinguishable in that the accused had focused his business on drug sales to school children from his car which was often parked immediately adjacent to a school. As such, there was clear evidence that the accused had a highly vulnerable clientele as repeat clients. There is no indication that the Applicant involved "G" on more than the single occasion of his arrest.

193 I am not satisfied that any of the other authorities relied on by Counsel provide more specific guidance on the applicable sentence for the Applicant.

194 Having considered all of the foregoing, I am satisfied that the effect of proof that the Applicant had used or

involved a young person in the commission of a section 5(2) CDSA offence is to move the custodial sentence applicable on these facts to the midrange of that appropriate for a person who is essentially a first time offender.

195 In ail of the circumstances, therefore, and considering the principles of section 718 of the Criminal Code the appropriate sentence for the Applicant would be 8 months imprisonment based on the range established in *Cisneros* absent consideration of subsection 5 (3) a (ii) C of the CDSA.

Summary of Findings and Analysis with respect to the Particularized inquiry

196 If the mandatory minimum sentence of two years or 24 months imprisonment were applied to the Applicant, such a disposition would be 16 months greater than the sentence that would otherwise have been imposed on the facts relevant to the Applicant absent consideration of subsection 5 (3) a (ii) (C) of the CDSA.

197 In the result, the sentence required by the application of subsection 5 (3) a (ii) C of the CDSA would be three times that ordinarily imposed by the Court.

198 If the sentence sought by the Crown were imposed, the disposition would be 20 months greater than usual sentencing principles would require, three and half times the sentence that would ordinarily be imposed.

199 Requiring the application of the specified minimum sentence in subsection 5 (3) a (ii) C of the CDSA significantly affects the consequences of a conviction in cases involving a young person. This is particularly so in the circumstances of a first offender under the CDSA such as the Applicant. As such I find that the gravity of such a conviction is clearly more profound with the application of subsection 5 (3) a (ii) C of the CDSA.

200 The penological goal of deterring offenders from the exposure of young persons to the drug trade are significant and important to Canadian Society. However, the new mandatory minimum sentence in sub section 5 (3) a (ii) C dramatically increases the "floor" for sentencing by proof not of the elements of an enhanced or more blameworthy substantive offence, but rather an aggravating circumstance .

201 Considering all of the foregoing, I find that imposition of the mandatory minimum sentence required by subsection 5 (3) a (ii) C of the CDSA results, in the case of the Applicant, in a sentence that is a grossly disproportionate such that "Canadians would find the punishment abhorrent or intolerable": R. *v. Morrisey*, 2000 SCC 39 at para. 26; *Ferguson* at para. 14; *Smith* at 1072.

202 I have concluded that the mandatory minimum sentence required by subsection 5 (3) a (ii) C in relation to the Applicant on the facts of this case results in a grossly disproportionate sentence that Canadians would find "abhorrent or intolerable because:

(a) The Applicant is before the Court without a prior cognate conviction under the CDSA;

(b) Although the offence of PPT is very serious and the impacts of using or involving a young person are grave, the effect of a two year sentence on this accused would be profound as he is removed from his family, community and employment to serve a sentence in a federal prison; and

(c) The mandatory minimum sentence of two years imprisonment is three times the sentence that would ordinarily be imposed on the Applicant on the facts of this case. As such the required sentence would be more than excessive based on the tests set out in *Ferguson* and in fact result in a sentence that is a grossly disproportionate such that Canadians would find the punishment abhorrent or intolerable.

203 I find, therefore, that with respect to the Applicant, the imposition of a minimum sentence of two years as required by subsection 5 (3) a (ii) C of the CDSA would constitute cruel and unusual punishment contrary to section 12 of the *Charter*.

204 In reaching this conclusion I have considered each of the contextual matters noted above relevant to the

particularized inquiry into the circumstances relevant to the Applicant, the individual circumstances of the offence for which the Applicant has entered a guilty plea, his personal circumstances and the specific circumstances relevant to the offence.

205 On the particularized inquiry, therefore, I find that the rights of the Applicant under section 12 of the *Charter* have been breached on the facts of the current case as a result of the required application of subsection 5 (3) a (ii) C of the CDSA..

206 Following the principles of analysis established in *Nur* with particular reference to paragraph 65 of that decision, it is not necessary to continue to consider the second stage or reasonable hypothetical situations applicable to the section 12 analysis.

B.M. NEAL PROV. CT. J.

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