SCC Court File No.: 40882

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)

BETWEEN:

ATTORNEY GENERAL OF QUEBEC and HIS MAJESTY THE KING

Appellants

- and -

LOUIS-PIER SENNEVILLE and MATHIEU NAUD

Respondents

- and –

**RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS,
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
CANADIAN CENTRE FOR CHILD PROTECTION INC. and
ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE**

Interveners

FACTUM OF THE INTERVENER, CANADIAN CENTRE FOR CHILD PROTECTION INC.

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PARTS I & II – OVERVIEW AND POSITION

1. This appeal provides the opportunity for this Court to review and clarify the sentencing principles that apply to the offences of accessing and possessing child sexual abuse material ("CSAM"),[1] as set out in ss. 163.1(4) and 163.1(4.1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

2. The Canadian Centre for Child Protection Inc. ("C3P") intervenes to underline the importance of placing the victims and the wrong and harms that people who access and possess CSAM inflict on them at the centre of the sentencing process. These victims are often invisible in the court process, and as the Court of Appeal for Ontario recently affirmed in *R. v. Pike*, "[c]ourts must overcome this invisibility by making child victims the central focus."[2]

3. C3P makes three submissions. First, C3P urges this Court to consider how the advent of the internet—and the modern context in which CSAM is accessed, exchanged, and preserved—has aggravated the nature of harm caused by the offences at issue in this appeal.

4. Second, victim harms must be sufficiently accounted for in the context of the section 12 analysis. In particular, the harms against children must be centred in the reasonably foreseeable hypothetical exercise, which presents a risk that harms will be obscured by abstraction and diminished by the intentional minimization of the hypothetical offender's moral culpability.

5. Third, this Court ought to provide guidance for sentencing judges on the factors that ought to be considered as aggravating circumstances. The case law reveals that such guidance is needed to ensure that misconceptions about sexual violence victims and offenders are not perpetuated by our courts, and do not interfere with ordering fit and proportionate sentences.

PART III - STATEMENT OF ARGUMENT

A. THE CURRENT REALITIES AND HARMS OF CSAM

6. In *R. v. Sharpe*, this Court provided a comprehensive overview of the dangers associated with CSAM and the need for its criminalization. *Sharpe* correctly recognizes that CSAM is directly

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[1] C3P uses the term "child sexual abuse material" to refer to what s. 163.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*") defines as "child pornography".

[2] *R. v. Pike*, 2024 ONCA 608 at para. 160.

harmful to children who are abused in its production.[3] The concurring reasons also acknowledge the broader societal harm caused by the "harmful, dehumanizing and degrading message[s]"[4] about children that CSAM fosters and disseminates, and make the point that s. 163.1 of the *Code* addresses Canada's responsibilities under Article 34 of the United Nations *Convention on the Rights of the Child*.[5]

7. Today's technological environment is fundamentally different than when *Sharpe* was before this Court in 2001. While the concurring reasons in *Sharpe* recognized that the advent of the internet has complicated and compounded the problem of CSAM,[6] technological advances and the ubiquity of smartphones, computers and broadband access have worsened the effects of CSAM. The harms recognized in *Sharpe* must now be understood in the context of this modern technological reality, which has exacerbated both (1) ease of access to CSAM, expanding the opportunities to offend; and (2) the nature and severity of the harms flowing from the access and possession offences.

8. As this Court recognized in *R. v. Friesen*, the internet has provided sexual offenders with "unprecedented access" to children and opportunities to commit sexual violence against them.[7] This changing landscape has magnified the serious harms recognized in *Sharpe*, allowing them to manifest themselves in ways that could not have been known in 2001.[8]

9. Indeed, the Court of Appeal for Ontario in *R. v. Pike* recently recognized that the ubiquity of the internet has made CSAM easier to access, while bringing likeminded perpetrators together to "form online communities that normalize their crimes and encourage more extreme forms of

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[3] *R. v. Sharpe*, 2001 SCC 2 at para. 92.
[4] *R. v. Sharpe*, 2001 SCC 2 at para. 167.
[5] *R. v. Sharpe*, 2001 SCC 2 at para. 196. Canada is also a signatory to the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, A/RES/54/263 (2000), Annex II, which was signed by Canada in 2001 and ratified on September 14, 2005.
[6] *R. v. Sharpe*, 2001 SCC 2 at para. 166.
[7] *R v. Friesen*, 2020 SCC 9 at para. 47.
[8] *R. v. Sharpe*, 2001 SCC 2 at para. 179. For a discussion of the modern realities of CSAM, see *R. v. Pike*, 2024 ONCA 608 at para. 144.

offending".[9] Online access can also provide offenders with the shield of anonymity. There is now widespread access to CSAM on the clear web that does not require download or leave any trace on their devices—for example, through virtual private networks[10] and devices with data scrubbing software.[11] As one offender told the court, "he did not know that what he was doing was a crime because the videos and photos were so easily obtained that he assumed it had to be legal".[12] The internet has also fundamentally changed the nature and severity of harms experienced by victims of CSAM. One dimension of this flows from the permanence of digital images once they have circulated online: it is impossible for victims, aware that images of their own sexual abuse exist, to ever achieve confidence those images have been completely eradicated. The knowledge that people can still access images of their abuse—and derive gratification from viewing them—torments victims with the feeling of constantly re-living their initial abuse.[13]

10. As noted by the Court of Appeal for Ontario in *R. v. J.S.*, where CSAM is posted online, the violation of victims "is repeated every time the images are viewed on the Internet, where they cannot be erased and will likely reside in perpetuity" and victims "may be further traumatized by the knowledge that these images and films could surface in their personal lives at any time."[14] Having no control or power over the continued existence and dissemination of CSAM is a repeated denial of the victim's right to dignity, bodily autonomy and sexual integrity.

11. The prevalence of online access and the ease with which offenders can anonymously share information about victims and their whereabouts fosters fear in victims that they will be recognized in their real lives, or will be targeted with unwanted contact or harassment from people who have viewed their images online.[15] This fear is made worse by the reality that identifying information about victims, including their social media accounts and home addresses, has been shared in chat

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[9] *R. v. Pike*, 2024 ONCA 608 at para. 144; *R. v. Lang*, 2015 ABPC 25 at para. 5; *R. v. J.V.H.*, 2010 BCPC 253 at paras. 6, 27-29; *R. v. J.A.*, 2019 MBQB 112 at paras. 5-6.
[10] *R. v. Leclair*, 2024 ONSC 1217.
[11] *R. v. Trautman*, 2015 ABPC 189 at paras. 88-89; *R. v. J.M.W.*, 2020 ABCA 294 at para. 56.
[12] *R. v. Sheffield*, 2020 BCSC 1807 at para. 15.
[13] *R. v. Sharpe*, 2001 SCC 2 at para. 92; *R. v. Pike*, 2024 ONCA 608 at para. 147; *R. v. Isbister*, 2024 BCSC 1836 at paras. 24-27; *R. v. McCrimmon*, 2021 YKTC 28 at paras. 15-21.
[14] *R. v. J.S.*, 2018 ONCA 675 at para. 120.
[15] See *R. v. V.T.H.*, 2022 ONSC 5668 at para. 51; *R. v. A.A.*, 2023 NBPC 14 at para. 30; *R. v. Suomu*, 2018 MBPC 3 at para. 6.

groups and dark web forums that are used to exchange CSAM, exposing victims to the constant threat of repeated sexual harassment and abuse.[16]

12. To give effect to the legislative scheme's purpose of combatting exploitation and harm to children, courts must account for the current realities of how CSAM is accessed and shared, and the immense harms that flow from its distribution and use. As *R. v. Pike* recognized, "[b]y seeking out child pornography, people who possess this material also wrongfully foster demand that drives more victimization and run the risk that the material they seek to acquire and view could incite and facilitate the commission of other offences against children."[17] Giving appropriate weight to the current realities and harms also accords with the broader legislative imperative to give primary consideration to the objectives of denunciation and deterrence when imposing a sentence for crimes that subject children to abuse.[18]

B. EVALUATING HARM IN THE SECTION 12 CONTEXT

13. This Court's s. 12 jurisprudence establishes that determining the constitutionality of a mandatory minimum sentence often requires analysis of an appropriate sentence for a reasonably foreseeable offender. First, a sentencing judge must determine an appropriate sentence for the reasonably foreseeable offender. Second, a sentencing judge must determine whether the mandatory minimum sentence is grossly disproportionate to the fit sentence.[19]

14. Although the reasonably foreseeable hypothetical is crucial to the section 12 analysis, it must be engaged with extreme care, so as not to lose sight of victim experience or the inherent harm caused by sexual violence against children. While any analysis of sentencing for a reasonably foreseeable offender requires a "proper understanding of the wrongfulness and harmfulness" of the offence, by its nature, the "use of reasonably foreseeable scenarios is expressly designed to test the lower end of the spectrum."[20]

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[16] See *R. v. Champagne*, 2024 CarswellOnt 7163 (C.J.) at para. 46; *R. v. Simpson*, 2021 ONSC 6032 at para. 43; *R. v. McCrimmon*, 2021 YKTC 28 at para. 17; *R. c. Larouche*, 2023 QCCQ 1853 at para. 42; *R. v. Labelle*, [2024] O.J. No. 2203 (C.J.) at paras. 25-30.
[17] *R. v. Pike*, 2024 ONCA 608 at para. 162.
[18] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.01.
[19] *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 104.
[20] *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 106.

15. The risk with this exercise is that it can trivialize the harm caused by CSAM: both by obscuring the potential victims and their harm through abstracting the offence, and by tempting the trier of fact to minimize the harm by focusing on sympathetic considerations about the offender that may lower their moral culpability. Take, for example, the hypothetical scenario of an 18-year-old boyfriend who receives a sexually explicit image from his 17-year-old girlfriend. The boyfriend then shares the image with his friends without his girlfriend's knowledge or consent. It is acceptable to treat the boyfriend's age as a consideration that may lower his moral culpability, but the offender's age cannot be used to *minimize* the harm delivered to the 17-year-old girlfriend. She is no less worthy of protection because of her offender's age, and she is no less likely to experience the victimization and serious harms inflicted on her because she is a teenager and not an infant.[21]

16. Sentencing offenders who have committed crimes related to child sexual abuse material is made uniquely difficult by the fact that victims of these crimes are often not identified or difficult to obtain testimony from. To help address this challenge for sentencing judges, in 2016, C3P began assisting identified victims of CSAM and their parents and/or guardians with submitting victim impact statements in Canadian sentencing proceedings.[22] Where a victim impact statement isn't available, the absence of a victim in the courtroom may lead to trivialization or misunderstanding of the harm flowing from the reasonably foreseeable offender's hypothetical conduct. Even when a victim has been identified and their evidence is available, "it is all too easy" for considerations of the offender's personal circumstances or their rehabilitative potential to "overshadow the wrongs and harms they inflict."[23] This is why, as the Court of Appeal for Ontario recently urged, courts must not "use the personal circumstances and mitigating factors of people who possess child pornography to avoid grappling with the wrongs and harms they cause."[24]

17. The difficulty of assessing the harms caused by sexual violence against children when no known victim can be identified was highlighted in *Friesen*. This Court recognized that a finding of

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[21] *R. v. Friesen,* 2020 SCC 9 at para. 136.
[22] See e.g. *R. v. Leclair,* 2024 ONSC 1217 at paras. 7-9, 17, 24; *R. v. Labelle*, [2024] O.J. No. 2203 (C.J.) at paras. 25-30; *R. v. Venclovsky,* 2023 YKTC 50 at paras. 13-16; *R. v. A.A.*, 2023 NBPC 14 at para. 30; *R. v. Suomu,* 2018 MBPC 3 at para. 6.
[23] *R. v. Pike*, 2024 ONCA 608 at para. 160.
[24] *R. v. Pike*, 2024 ONCA 608 at para. 160. See also *R. v. B.J.M.*, 2019 BCPC 303 at paras. 60-61; *R. v. McDowell*, 2023 ABPC 59 at para. 39; *R. v. L.H.H.*, 2023 BCPC 82 at para. 19.

actual harm can arise where the victim's testimony is unavailable,[25] and in cases where an accused is caught through a police sting operation.[26] *Sharpe* recognized that "available evidence suggests that explicit sexual materials can be harmful whether or not they depict actual children", and moreover, "it can be very difficult to distinguish a 'real' person from a computer creation or composite".[27] Indeed, the production of CSAM through artificial intelligence, including deepfakes, is a present and growing danger for children worldwide.[28] The significant harms for victims, their families, and children as a group must be recognized for all CSAM offences.

18. It is also worth noting that, unlike the child luring offences considered by this Court in *R. v. Bertrand Marchand* to be broad, access and possession offences are narrow in scope. In addition to a narrow statutory definition for "child pornography",[29] the *Code* and case law provides for defences to these offences—including when the possession and access of CSAM is for a legitimate purpose, such as medicine or art, and does not pose an undue risk to children.[30] Together, these provisions and jurisprudence function to ensure that convictions are restricted to the harmful behavior that Parliament intended to criminalize.

19. Moreover, a review of the case law shows that courts apply the language of the statutory scheme strictly and conservatively: many "borderline" images—which depict children sexually, and in a manner that threatens their dignity and safety—will not meet the high threshold for conviction of these offences.[31] For example, in one case, the court was satisfied that videos of children in their swimsuits had the clear purpose of sexual objectification and gratification, but declined to find they were child pornography because there was no clear depiction of the children's sexual organs.[32] This Court ought to consider the narrow scope of these offences in crafting its

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[25] *R. v. Friesen*, 2020 SCC 9 at para. 86.
[26] *R. v. Friesen*, 2020 SCC 9 at paras. 93-94.
[27] *R. v. Sharpe*, 2001 SCC 2 at para. 38.
[28] *R. c. Larouche*, 2023 QCCQ 1853 at paras. 66, 69-72. See also Mémoire des Appelants at paras. 105-06, 118.
[29] *Criminal Code*, R.S.C. 1985, c. C-46, s. 163.1(1).
[30] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 163.1(5)-(6); *R. v. Sharpe*, 2001 SCC 2 at paras. 115, 128.
[31] See e.g., *R. v. E.L.*, 2019 ONSC 2189; *R. v. Ratcliffe*, 2020 ONCJ 554; *R. v. Patterson*, 2018 ONSC 4187.
[32] *R. v. Ramlogan*, 2019 ONCJ 473.

reasonably foreseeable hypothetical scenarios for the section 12 analysis, keeping in mind how strictly the courts apply these provisions.

C. SENTENCING PRINCIPLES MUST NOT PERPETUATE MISCONCEPTIONS

20. Recognition of the current realities and victim harms of CSAM is crucial for a sentencing judge to arrive at a fit and proportionate sentence. Equally as important is the rooting out of misconceptions about CSAM victims and offenders, which can distort the sentencing process with outdated and inaccurate assumptions about the impact and severity of CSAM offences.

21. A review of the relevant jurisprudence reveals that sentencing courts have at times misapplied aggravating factors in CSAM sentencing decisions and have also relied upon fallacies surrounding the nature of CSAM possession and access. For example, recent jurisprudence reveals the following misconceptions, amongst others:

(a) Reliance on an offender's lack of sophistication or misguided reasoning for using CSAM to minimize the actual harm caused by CSAM;[33]

(b) An undue focus on collection size and the belief that possession of a small collection is a mitigating rather than neutral factor, especially given the prevalence of access to materials that can be viewed without download and the number of children victimized in even a "small" collection;[34]

(c) Bringing other offences, such as the distribution of CSAM, into the analysis and reasoning that the absence of another offence is mitigating;[35]

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[33] *R. v. Galbraith*, 2024 ONCJ 397 at para. 21; *R. v. Mahombi*, 2022 QCCQ 95 at para. 65; *R. v. Belke*, 2017 ABPC 284 at para. 12; *R. v. Quested*, 2019 BCPC 95 at paras. 26-27.
[34] *R. v. Booth*, 2019 BCPC 160 at para. 64; *R. v. Morrison*, 2019 ONCJ 262 at paras. 18-19; *R. v. Ereault*, 2022 ONCJ 270 at para. 48. See also *R. v. Pike*, 2024 ONCA 608 at para. 167; *R. v. Greene*, 2024 ONCJ 462 at p. 80; *R. v. B.J.M.*, 2019 BCPC 303 at para. 57.
[35] *R. v. Afzaal*, [2022] O.J. No. 927 (C.J.) at para. 19; *R. v. Galbraith*, 2024 ONCJ 397 at paras. 21, 30-31; *R. v. O'Donovan*, 2021 ABPC 216 at para. 35.

(d) The offender's positive or sympathetic circumstances receiving undue weight in comparison to the objectives of denunciation and deterrence.[36] Not only does this offend the explicit direction in s. 718.01 of the *Code*, it threatens to skew sentencing decisions with class discrimination (for example, by delivering a lighter sentence to an "upstanding citizen" with a respectable career and family);[37]

(e) Minimizing the harm produced by CSAM that is not the "worst of the worst", for example, by considering CSAM featuring preteens or teenagers or CSAM that does not show explicit sexual violence as mitigating[38] or "exceptional".[39] There should be no hierarchy of physical acts in determining the severity of the offence;[40] and

(f) Treating a lack of payment for possessing and accessing CSAM as mitigating or a factor that reduces the offender's moral culpability.[41] The majority of offenders do not pay for CSAM, which is readily available on the internet for free and traded amongst likeminded individuals like "trading cards".[42] A lack of payment does not mean that an offender has not contributed to the commodification of the children whose sexual abuse and exploitation is depicted in the material.[43]

22. The risk with these misconceptions is twofold. First, there is a risk that in relying on them, sentencing judges perpetuate harmful misconceptions about victims and minimize the nature of

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[36] *R. v. Dutchession*, 2021 ONCJ 480; *R. v. Bisson*, 2020 BCSC 1778; *R. v. Mitchell*, 2021 BCPC 246.
[37] *R. v. Pike*, 2024 ONCA 608 at para. 172.
[38] *R. v. Galbraith*, 2024 ONCJ 397 at para. 21; *R. v. Huard*, 2023 QCCQ 1949 at paras. 23, 65; *R. v. O'Donovan*, 2021 ABPC 216 at para. 35; *R. v. Jenkins*, 2021 PESC 6 at para. 6; *R. v. Morrison*, 2019 ONCJ 262 at paras. 18-19.
[39] *R. v. Vandermeer*, 2021 BCPC 94 at paras. 37, 43.
[40] *R. v. Friesen*, 2020 SCC 9 at para. 146. While that decision considered the offence of sexual interference, its reasoning applies equally with respect to CSAM. See *R. v. Claveria*, 2021 ONCJ 348 at para. 38.
[41] *R. v. Galbraith*, 2024 ONCJ 397 at paras. 30-31; *R. v. Vandermeer*, 2021 BCPC 94 at para. 37; *R. v. Trentadue*, 2022 ONCJ 54 at para. 36.
[42] *R. v. Pike*, 2024 ONCA 608 at para. 171. See e.g. *R. v. Lang*, 2015 ABPC 25 at para. 26.
[43] *R. v. Pike*, 2024 ONCA 608 at para. 171; *R. v. Rodrigues*, 2022 CarswellNfld 203 (P.C.) at para. 91.

their harms. Second, there is a risk that allowing these misconceptions to permeate sentencing decisions will prevent a sentencing judge from arriving at the just and appropriate sentence. Both risks threaten to further harm victims and diminish "the credibility of the criminal justice system in the eyes of victims, their families, caregivers, and communities, and the public at large,"[44] necessitating strong guidance from this Court that sentencing decisions must not be tainted by misconceptions about CSAM victims or offenders.

23. There are also indicators of moral culpability that some courts have started to recognize in the jurisprudence, but which C3P submits should be established as factors that ought to be considered aggravating when considering a proper sentence:

(a) *Organization of the offender's collection.* Organization of the offender's collection indicates a high degree of engagement with the material, which is a marker of moral culpability.[45] This factor will be relevant where the offender has, for example, categorized his collection of images by the age of the victim. Related to this is considering if the offender stored other images of children, such as other images of CSAM victims or images of nude or voyeuristically recorded children that do not meet the definition of CSAM;[46]

(b) *The offender's means of obtaining the CSAM.* It should be considered aggravating where the offender went to great lengths to obtain CSAM and/or to evade detection by law enforcement, for example, through the dark web, persistent searches for particular material or the use of encrypted email services;[47]

(c) *The offender's possession or sharing of, or attempts to obtain, identifying information about victims.* Given the significant threat to the security of victims arising from the availability of identifying information about them, the court should

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[44] *R. v. Friesen*, 2020 SCC 9 at para. 43.
[45] *R. v. Pike*, 2024 ONCA 608 at para. 167; *R. v. Watson*, 2018 BCCA 329 at para. 10; *R. c. F.M.*, 2022 QCCQ 5175 at para. 9; *R. v. Partanen*, 2021 BCPC 245 at para. 73; *R. v. Pinner*, 2023 ONSC 7530 at para. 31; *R. v. Greene*, 2024 ONCJ 462 at paras. 33-34.
[46] *R. v. McCrimmon*, 2022 YKCA 1 at para. 7; *R. v. Ereault*, 2022 ONCJ 270 at para. 7; *R. v. Leclair*, 2024 ONSC 1217; *R. c. Larouche*, 2023 QCCQ 1853 at para. 44.
[47] *R. v. Faivre*, 2018 QCCQ 7467 at paras. 171-172; *R. v. Greene*, 2024 ONCJ 462 at p. 17; *R. v. Burke*, 2015 SKPC 173 at paras. 13-16, 23.

treat any evidence of the offender's possession or efforts to obtain information that could identify a victim as aggravating.[48] This includes evidence in the CSAM itself, such as visibility of faces or home environments, and evidence exchanged collaterally in forums and chat groups, such as information about where the victims live, attend school, work, their full names or current age, people in the victim's life, and their contact information or social media accounts;[49] and

(d) *Any evidence the offender was connected to or contributed to the production or exchange of CSAM.* Participation in online sub-culture for people seeking out CSAM is harmful to children because it can facilitate opportunities to offend (by sharing resources and advice) and encourage more extreme forms of offending.[50] The court should treat evidence that an offender's actions were connected to or contributed to the production or sharing of CSAM as aggravating, for this reason.[51]

24. C3P urges this Court to establish these additional factors as those which should be considered aggravating on sentencing. In C3P's submission, this guidance would better serve the important legislative goals of protecting children and society by ensuring sentencing decisions properly account for victim harms and threats to society.[52]

PARTS IV & V – COSTS AND ORDER REQUESTED

25. C3P takes no position with respect to the disposition of this appeal and seeks no order in this matter. C3P does not seek costs and requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of November, 2024.

Samantha Hale / Amy Goudge
Counsel for the Intervener, Canadian Centre for Child Protection Inc.

[48] *R. v. Mehagan*, 2022 ONCJ 673 at para. 16.
[49] *R. c. Larouche*, 2023 QCCQ 1853 at para. 42.
[50] *R. v. Pike*, 2024 ONCA 608 at para. 144.
[51] *R. v. M.C.*, 2024 ONSC 2928 at paras. 56-67.
[52] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 718(a), 718(b), 718(f), 718.01.

PART VI - TABLE OF AUTHORITIES

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