PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v MacDonald*, 2023 NSPC 53

Date: 20231219
Docket: 8450076, 8455935, 8455939
Registry: Pictou

Between:

His Majesty the King

v

Justin Stanley MacDonald

SENTENCING DECISION

Restriction on Publication: 486.4
Any information that will identify the complainants shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W. Atwood
Heard:	November 14 and November 22, December 19, 2023, in Pictou, Nova Scotia
Charge:	Sections 151 and 733.1 of the *Criminal Code of Canada*
Counsel:	Peter Dostal and Josie McKinney for the Nova Scotia Public Prosecution Service Pavel Boubnov for Justin Stanley MacDonald

Order restricting publication — sexual offences

By court order made under subsection 486.4(1) of the *Criminal Code*, information that may identify the persons described in this decision as the complainants may not be published, broadcast, or transmitted in any manner. This decision complies with this restriction so that it can be published.

By the Court:

Synopsis

[1] In 2023 NSPC 21, the Court found Justin Stanley MacDonald guilty of the following offences:

- touching EH for a sexual purpose (§ 151 of the *Criminal Code* [*Code*], information 806310, case 8450076);
- sexually assaulting EH (§ 271, information 806310, case 8450075);
- touching KB for a sexual purpose (§ 151, information 807763, case 8455935);
- sexually assaulting KB (§ 271, information 807763, case 8455936);
- breaching a keep-the-peace condition of a probation order that was made on 1 February 2018; the alleged breach is the commission of the preceding offences (§ 733.1, information 807763, case 8455939).

[2] The Court conditionally stayed the two § 271 counts.

[3] Mr MacDonald is before the Court today for sentencing.

Circumstances of the offences

[4] Mr MacDonald had unprotected sexual intercourse with EH on two to four occasions at his apartment in New Glasgow. EH testified that she was provided with controlled substances while at the apartment; however, she was clear that Mr MacDonald's roommate was the supplier.

[5] Mr MacDonald engaged in sexualized physical contact with KB; they took selfies of each other, which depicted them touching tongues, lying in a bed at Mr MacDonald's apartment while not appearing to be wearing clothing, and having intimate embraces. Comments made by Mr MacDonald to police when he was informed of KB's age might suggest that there was more; however, KB declined to give evidence, and so the Court was unable to make a finding of fact whether Mr MacDonald and KB had ever had full sexual intercourse.

[6] KB and EH lived at a group home in Pictou County that supports adolescents with histories of adverse childhood experiences including sexual exploitation. Both were 15 years old at the time of their contact with Mr MacDonald. Mr MacDonald was wantonly reckless about the ages of KB and EH; in fact, he though they were underage.

[7] The § 151 offences occurred between 1 January to 15 July 2020. During this time, Mr MacDonald was subject to a two-year probation order (JEIN order # 2052459); the order was part of a sentence imposed 1 February 2018 for an earlier sexual offence committed by Mr MacDonald. Mr MacDonald's criminal conduct with EH and KB amounted to a breach of the keep-the-peace condition of that order.

Circumstances of Mr MacDonald

[8] The Court has access to the trial record, and has heard submissions from counsel. Mr MacDonald made an allocution to the Court.

[9] The Court has a presentence report [PSR] dated 28 September 2023.

[10] The Court has received also a comprehensive forensic sexual behaviour presentence assessment, dated 2 October 2023 prepared by Dr Michelle St Amand-Johnson [the "assessment"]. The assessment contains everything that is in the PSR, but with greater detail and depth; additionally, the assessment offers a comprehensive, actuarial-based risk assessment which is beyond the scope of a PSR. In reciting Mr MacDonald's personal circumstances, the Court will rely mostly on the assessment. Pinpoint references to the assessment are in the following format: (n=page number).

[11] Mr MacDonald is 26 years old. He was 22 years of age when he committed the offences for which he is to be sentenced: (2).

[12] Mr MacDonald participated appropriately in the preparation of the assessment: (3).

[13] In discussing with Dr St Amand-Johnson the circumstances of the offences, Mr MacDonald repeated the assertion he made at trial that he believed EH was over the age of 16: (3).

[14] He denied having sexual intercourse with KB (3); this point particular point is not controversial, as there was no evidence heard at trial of Mr MacDonald having had sexual intercourse with KB.

[15] Mr MacDonald experienced a chaotic childhood and adolescence; he endured a significant number of adverse childhood experiences: (7-8).

[16] He enjoyed school; however, he began using controlled substances at age 14, and his educational progress deteriorated after that: (8). He hopes to complete the GED program: (9). A neuropsychological assessment conducted in 2022 found that Mr MacDonald had intellectual and cognitive abilities within broad normal limits, with observed weaknesses in nonverbal memory, complex attention, and

tactile sensory discrimination bilaterally, most consistent with non-dominant temporal-lobe dysfunction as well as frontal interference: (16).

[17] The assessment make reference to additional mental health issues; Mr MacDonald has received clinical services for some of them:

- ADHD: (8).
- Chronic substance use disorder; including the misuse of prescribed therapeutic substances and non-prescribed Schedule I substances: (8-12).
- Depression and anxiety: (12, 17, 33).
- Seizures: (12, 16).
- Suicidal ideation and self-harm: (17).

[18] At the time of the preparation of the assessment, Mr MacDonald was awaiting a mental-health-and-addictions appointment in New Glasgow: (17, 19).

[19] Dr St Amand Johnson’s final diagnoses confirmed earlier clinical assessments: (23).

[20] Mr MacDonald is living with Ms Tara Hughes at a rural property in Pictou County. With Ms Hughes' help, his controlled-substance use appears to be in remission: (12).

[21] Mr MacDonald is the parent of a 5-year-old child from a relationship that ended in 2019; Mr MacDonald's mother, who lives in western Canada, has custody of the child and Mr MacDonald does not appear to be involved in the child's upbringing: (13-14). Mr MacDonald's mother has custody of a second child whom Mr MacDonald regards as his daughter; however, the paternity of this child appears uncertain: (14).

[22] Mr MacDonald's concept of agency, personal integrity and informed consent is unsophisticated and problematic. When questioned by Dr St Amand-Johnson about his sexual history, Mr MacDonald offered the following information:

> He also said that he has never been refused when making a sexual advance (noted that he denies sexually assaulting SH, despite pleading guilty to same). When asked to suggest what might be a sign of refusal, he suggested that a partner might "face the wall" (i.e., turn away from him). (15)

[23] Mr MacDonald pleaded guilty on 1 February 2018 to a count of sexual assault; he was sentenced to one year in prison, followed by a 2-year term of

probation. Mr MacDonald rationalized his guilty plea in 2018 as a mistake; he believed that the charge was instigated by the mother of the victim: (13, 26).

[24] The 2018 probation order required Mr MacDonald to attend for sex-offender-related programming. Mr MacDonald's engagement with programming was equivocal, and led to an unfavourable prognosis for rehabilitation; following the completion of his sentence of imprisonment, he left for western Canada and did not attend any group-treatment sessions: (18-19). That prognosis turned out to be largely accurate, given Mr MacDonald's later conduct that brings him before the Court today; completing group treatment might have made a difference—but, of course, that is speculation. Suffice it to say that Mr MacDonald's disengagement from earlier rehabilitative and risk-reduction measures supports circumstantially a finding that he would be a questionable candidate for a rehabilitative sentence.

[25] Mr MacDonald score on the Sex Offender Risk Assessment Guide situated him at the 90th percentile; only 10 per cent of incarcerated forensic sexual offenders would score higher: (29).

[26] The assessment offered the following risk-assessment summary:

> Overall, a combination of the Static and Stable instruments indicates that Mr.MacDonald's baseline risk for sexual recidivism is two to four times that of

> the "average" adult male adjudicated for crossing legal sexual boundaries . . . . Mr. MacDonald also poses a moderate to high risk for general violence, although considering his recent history, it seems that sexual misconduct may be more likely than non-sexual violence. Still, Mr. MacDonald does have a history of physical aggression as a youth and as an adult continues to struggle with emotion regulation, although harm when distressed has tended to become self-directed (e.g., cutting, suicide ideation). (32)

[27] As described earlier, the assessment summarized Mr MacDonald's treatment for epilepsy. His symptoms appear to be managed very effectively with indicated therapeutic treatment and medication. However, the assessment alerted the Court to the possibility of Mr MacDonald malingering or deliberately triggering a seizure to try to influence the Court: (16). In fact, Mr MacDonald was medically evacuated to hospital on the first day scheduled for his sentencing hearing because of an apparent seizure episode. He seemed to experience another medical issue today; Sheriff Services officials acted promptly and appropriately to have Mr MacDonald evaluated. In the result, Mr MacDonald made a remarkably speedy recovery. While the circumstances and the timing of these medical events might raise some suspicion, absent a clinical evaluation that Mr MacDonald was feigning an illness, I decline to draw any adverse inferences. Mr MacDonald has a lot at stake in this hearing; it would be natural for him to be affected by a high level of anxiety.

[28] In an allocution to the Court today, Mr MacDonald stated that he was supposed to attend a counselling or assessment session yesterday in Halifax, but forgot about it.

Sentencing recommendations submitted by counsel

[29] The prosecution seeks a sentence of 5-years' imprisonment for the case involving EH, and 3 years, to be served consecutively, for the case involving KB. The Court has a comprehensive brief from Mr Dostal advocating for that outcome.

[30] Defence counsel has advocated today for a federal sentence of 3-3.5 years.

Statutory range of penalty

[31] Paragraph 151(a) of the *Code* provides:

> 151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

[32] The one-year mandatory-minimum penalty was found unconstitutional in *R v Hood*, 2018 NSCA 18, aff'g 2016 NSPC 78.

[33] As the mandatory-minimum penalty has been adjudged unconstitutional in Nova Scotia, this case is eligible for the following sentencing outcomes: a period of imprisonment up to 14 years, to which might be added a fine (§ 734 of the *Code*); or a period of probation, provided that any term of imposed imprisonment not exceed two years (¶ 731(1)(b)). It is eligible for a number of purely non-custodial sentences: a fine alone (s 734); a suspended sentence (¶ 731(1)(a)); a fine and probation (¶ 731(1)(b)). An indictable § 151(a) count is now eligible for a conditional sentence in virtue of SC 2022, c 15, s 14, in force 17 November 2022 on Royal Assent.

[34] Section 151 of the *Code* is a primary-designated offence under the DNA-collection provisions of § 487.04 of the *Code*. It calls for a lifetime sex-offender-information-registration order, given Mr MacDonald's record for sexual assault. It attracts a mandatory weapons-prohibition order under § 109(2). The court is required to consider the imposition of a § 161 prohibition order.

[35] The § 733.1 count carries a maximum term of imprisonment of 2 years. There is no mandatory-minimum sentence; it is eligible for the full array of non-custodial sentences that are legal in the *Code*.

Aggravating factors

[36] Child sexual abuse is statutorily aggravating under ¶ 718.2(a)(ii.1) of the *Code*, and the Court must give primary consideration to denunciation and deterrence, as directed in § 718.01 and 718.04.

[37] KB and EH lived at a group home in Pictou County that supports adolescents with histories of adverse childhood experiences including sexual exploitation. Both were 15 years old at the time of their contact with Mr MacDonald. They were particularly vulnerable to being sexually exploited by adult males.

[38] While the Court has not received victim-impact statements from KB or EH, the trial testimony of EH satisfies me that she has suffered significant impact from Mr MacDonald's conduct, so that the criterion in ¶ 718.2(a)(iii.1) of the *Code* has been proven beyond a reasonable doubt, as required by ¶ 724(3)(e). Sentencing courts are permitted to infer victim impact from the circumstances of an offence. In fact, in cases involving child sexual abuse, it is an obligation of sentencing courts, as will be addressed later on in this decision.

[39] There are certain factors which I do not consider aggravating.

[40] EH testified that she used controlled substances while at Mr MacDonald's apartment. However, she was clear that she was not offered drugs by Mr

MacDonald in exchange for sex. Further, she identified Mr MacDonald's roommate—John Bonnar—as the person who supplied her with substances. While I might agree with the prosecution that the lure of drugs brought EH to the apartment, I am unable to attribute that luring to Mr MacDonald. Accordingly, I do not regard this circumstance as an aggravating factor.

[41] Although Mr MacDonald was on probation at the time of the commission of the § 151 offences, he is to be sentenced for a § 733.1 offence which accounts for that probation breach. As a result, in sentencing Mr MacDonald for the § 151 counts, the court cannot treat the breach as an aggravating circumstance, as it would result in a double punishment: *R v Stewart*, 2016 NSCA 12 at ¶ 27; *R v Eisener*, 2023 NSPC 42 at ¶ 16; *R v Macdonald*, 2019 NSPC 14 at ¶ 11.

[42] On 1 February 2018 Mr MacDonald received a 12-month prison sentence and a 2-year term of probation for a § 271 offence. A criminal record is not an aggravating factor, and Mr MacDonald is not to be repunished for an earlier offence for which the sentence has been fully served. However, a record—particularly one that is recent and factually analogous—may signify a need for an elevated degree of specific deterrence, and may justify separating a repeat offender from society: *R v Naugle*, 2011 NSCA 33 at ¶ 47.

[43] Mr MacDonald maintains his innocence, which is not an aggravating factor: *R v Campbell*, [1977] NSJ 443 (AD). Rather, it is the absence of a mitigating factor and may be seen as diminishing the prospects of rehabilitation: *R v Gilliatt*, 2023 NSSC 304 at ¶ 39.

Mitigating factors

[44] I consider it mitigating that Mr MacDonald is a youthful adult, and the Court must not impose a sentence that would crush the prospect of rehabilitation: *R v Campbell*, 2022 NSCA 29 at ¶ 56 [*Campbell 2022*].

[45] Mr MacDonald is on the waiting list for mental-health and substance-use assessment. This constitutes circumstantial evidence of his willingness to engage in rehabilitative programming, notwithstanding his departure from counselling that had been ordered in 2018 as part of his sentencing for the § 271 offence.

[46] Mr MacDonald has the strong support of Ms Hughes, who has provided him with shelter, resources and work; as a result, Mr MacDonald's lifestyle has become more pro-social: he is focussed on his personal wellness, and has been able to avoid the non-therapeutic use of controlled substances. Ms Hughes' help has been invaluable.

R v Friesen

[47] *R v Friesen*, 2020 SCC 9 is a binding authority which requires courts to apply the following principles in sentencing adults who have been convicted of child-sexual-abuse offences:

- Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the *Code*— at ¶ 42.
- Sexual violence against children is especially wrongful because of their vulnerability—at ¶ 65.
- Sexual violence has a disproportionate impact on girls and young women—at ¶ 68.
- Sentencing judges must recognize the wrongfulness of sexual offences against children and the profound harm that they cause—at ¶ 50.
- The core interests protected by those provisions of the *Code* that criminalize the sexual abuse of children are personal autonomy, bodily integrity, sexual integrity, dignity, and equality—at ¶ 51.
- These core interests require courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological

scars that may be more pervasive and permanent in their effect than any physical injury—at ¶ 56.

- Emotional and psychological harms resulting from sexual abuse are particularly pronounced for children—at ¶ 57-58.

- Sexual abuse may be destructive of a child's relationship with families and caregivers—at ¶ 60-61.

- Other harms may include: erosion of trust, feelings of guilt and powerlessness, financial costs to families in order to obtain clinical services, social isolation, self-destructive behaviour, sleep disruption, feelings of guilt or shame, and unhealthy substance use—at ¶ 62-64, 79-81.

- Courts must take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle—at ¶ 75.

- In assessing the gravity of a child-sexual-abuse offence, a sentencing court must give effect to (1) the inherent wrongfulness of the offence; (2) the potential harm to children that flows from the offence; and (3) the actual harm that a child has suffered as a result of the offence—at ¶76.

- Courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of an offence—at ¶ 84. A child-sexual-abuse victim need not submit a victim-impact statement before a sentencing court can assess the level of victim impact. Child victims may refrain from submitting statements to avoid reliving the trauma: see *R v Ipeelie*, 2015 NUCA 3 at ¶ 10.

- Actual harm is a key determinant of the gravity of an offence—at ¶ 85.

- These offence-gravity factors must also be considered in determining the degree of moral responsibility of the person being sentenced—at ¶ 87.

- Because of the vulnerability of children, sexual exploitation of them aggravates the wrongfulness of the criminalized conduct: ¶ 77 and 78.

- This elevation of wrongfulness arises because the person being sentenced knew that the victim was a child, and knew of the increased risk of vulnerability to harm—at ¶ 88-90.

- Parliament's prioritization of denunciation and deterrence for sexual offences against children and vulnerable victims—implemented statutorily in § 718.01 and 718.04—places limits on the discretion of sentencing courts, such that it is no longer open to courts to elevate other sentencing

objectives to an equal or higher priority—at ¶ 102, 116. These provisions amplify the aggravating-circumstance factor in ¶ 718.2(a)(ii.1).

- Imposing proportionate sentences that respond to the gravity of sexual offences against children and the elevated moral responsibility of persons who commit them will frequently require substantial penalties; Parliament's statutory amendments have strengthened that message. Mid-single digit penitentiary terms for sexual offences against children ought to be seen as normal, and upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances—at ¶ 114.

- Substantial sentences may be imposed even when there was only a single instance of sexual violence, or a single victim—at ¶ 114.

- Assaults against a child should normally warrant a stronger sanction that assaults against an adult—at ¶ 117.

- Factors that should be accorded weight in determining a fit sentence are:

    - likelihood of the person being sentenced to reoffend;

    - abuse of a position of trust or authority;

  - o duration and frequency of the abuse;
  - o age of the victim; and,
  - o degree of physical interference—at ¶ 122-147.

- Unprotected acts may be regarded as aggravating because of the risk of disease—at ¶ 139.

- Harm to victims is not dependent on the type of physical activity involved; sexual violence is no less harmful to a victim "when it involve[s] sexual touching or fellatio rather than penetration"—at ¶ 143, citing with approval *R v Stuckless*, 2019 ONCA 504 at ¶ 68-69, 124-125.

- Treating the *de facto* consent of the victim as a mitigating factor is an error of law—at ¶ 149.

[48] Migrating outside *Friesen*, I conclude that it is as blameworthy that a person being sentenced was wantonly reckless about the age of a victim as if the person had actual knowledge—see *R v Tweneboah-Koduah*, 2018 ONCA 570 at ¶ 33, in which recklessness regarding lack of consent was equated with full knowledge for the purposes of fixing moral blameworthiness. In my view, the same principle applies to wanton recklessness regarding the age of the victim.

General sentencing principles—proportionality and individualization

[49] Proportionality is the fundamental purpose of sentencing; a sentencing must reflect the gravity of the offence and the degree of responsibility of the person who commits it: § 718.1

[50] This requires a sentencing court to take into account the correctional imperative of sentence individualization: *R v Knott*, 2012 SCC 42 at ¶ 47; *R v Boudreault*, 2018 SCC 58 at ¶ 58.

General sentencing principles—restraint

[51] A person who commits an offence should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances: ¶ 718.2(d)-(e).

[52] In *R v Gladue*, [1999] SCJ 19 at ¶ 31 to 33, and 36, the Court held that the statutory requirement that sentencing courts consider all available sanctions other than imprisonment was more than merely a codification of existing law. Rather the provision was to be seen as a remedy whereby imprisonment was to be a sanction of last resort.

[53] However, ¶718.2(e) also states that such restraint must be "consistent with the harm done to victims or to the community". That clause was added to the *Code* by the *Victims Bill of Right Act*, SC 2015, c 13, s 24, in force 23 July 2015 in virtue of § 60(1) of the *Act*. As a result, a sentencing court must consider not only the

circumstances of an offence and the degree of responsibility of the criminal actor; it must consider victim impact.

[54] The application of restraint criteria does not oust consideration of the other principles of sentencing in § 718-718.2; there is no such thing as a restraint-at-all-costs principle: *R v Proulx*, 2000 SCC 5 at ¶ 96. Put another way, restraint and rehabilitation do not trump deterrence and denunciation. In this case, there is a Parliamentary mandate that gives primacy to denunciation and deterrence. All principles and objectives of sentencing must be considered by a sentencing court in arriving at a fit sentence: *R v Howell*, 2013 NSCA 67 at ¶ 16.

General principles—denunciation and deterrence

[55] Denunciation is closely tied to the gravity of the offence and the need to communicate our society's condemnation of acts that infringe our basic moral values: *R v Hilbach*, 2023 SCC 3 at ¶ 70.

[56] It is important to reemphasize a point made earlier: Parliament has prioritized denunciation and deterrence for sexual offences against children and vulnerable victims in § 718.01 and 718.04 of the *Code*.

[57] When denunciation and general deterrence are paramount, the focus of the Court must be on the circumstances of the offence and its seriousness, rather

than on the personal circumstances of the person being sentenced: *R v Johnson*, 2020 MBCA 10 at ¶ 13. Personal circumstances are not ousted from the analysis; however, they take on a lesser role.

[58] Mr MacDonald is the third person I have sentences for offences involving the sexual victimization of young people residing in the same group home as EH and KB. While this does not elevate the seriousness Mr MacDonald's moral culpability, this is a circumstance that clearly demonstrates a need for the general deterrence of others in this community.

Consecutive sentences and totality

[59] In this case, there is no controversy over consecutive sentencing. With respect to the two counts of § 151, the provisions of § 718.3(7) (in force 17 July 2015 in virtue of SI/2015-68) make consecutive sentencing mandatory as the counts involve different victims.

[60] With respect to the § 733.1 count, a breach of a court order will normally attract a consecutive sentence, even if the conduct that is the basis of the breach is connected directly to an offence for which a sentence is to be imposed: *R v Harvey*, [1993] NSJ No 211 (CA) [*Harvey*]; *R v BLL*, [1989] NSJ No 12 [*BLL*]; *R v McKenna*, 2014 NSPC 99 at ¶ 8-10, aff'd 2015 NSCA 58; *R v Lewis*, 2012 NLCA 11 at ¶ 78.

[61] When consecutive sentences are imposed, the total sentence must not be unduly long or harsh: ¶ 718.2(d); this operates in conjunction with the restraint principles in ¶ 718.2(e) and (f), and the totality principle. I am mindful that the totality principle does not entitle a person being sentenced to a penalty reduction. Rather, a reduction in the aggregate sentence arises if the total is crushing or exceeds the overall culpability of the person being sentenced: *Campbell 2022* at ¶ 56.

Gap and step principles

[62] These principles were analysed in *R v Bernard*, 2011 NSCA 53 at ¶ 33-42. They are elements of the restraint principle in ¶ 718.2(d) and (e).

[63] The passage of an extended period of time since a person's last sentence is typically regarded as a mitigating factor, as that offence-free gap can be taken as circumstantial proof that the rehabilitative and deterrent intent of the earlier sentence actually worked. When the gap is a short interval—as in Mr MacDonald's case—lesser weight is given to the principle:

[64] The step principle works so that successive sentences are increased in modest steps, to ensure that the prospect of rehabilitation is not crushed.

[65] The effect of the principle is diminished when protection of the public—or, as in this case, when the mandate to give primary effect to denunciation and deterrence—is dominant: *R v Chudley*, 2016 BCCA 90 at ¶ 26, cited with approval in *R v Simms*, 2020 NSSC 239 at ¶ 37.

Credit for terms of bail

[66] The court must decide whether to reduce the sentence in recognition of Mr MacDonald having been subject to house-arrest terms of bail.

[67] In *R v Gibbons*, 2018 NSSC 202 at ¶ 65-73 and 75, the person being sentenced had spent 18 months on house arrest; the sentencing judge received documentary evidence and heard testimony from Mr Gibbons, his friends and treatment providers, all descriptive of the actual loss-of-liberty impact arising from house arrest. Based on that evidence, the judge reduced the intended sentence by 9 months, but rejected the defence proposition that a *Carvery*-level 1.5:1 credit ought to be given.

[68] In this case, there was no evidence called by Mr MacDonald in support of a bail-related sentence reduction.

[69] In fact, the assessment and the PSR would suggest that the house-arrest component of Mr MacDonald's release order had a beneficial effect: working

on Ms Hughes' farm (which was the house-arrest site) removed from Mr MacDonald's life those negative peers and influences that had contributed to his offending behaviour

[70] I am not satisfied that there is an evidentiary basis that would support an earned-through-bail reduction of sentence: *R v Knockwood*, 2009 NSCA 98 at ¶ 36 [*Knockwood*]. Having said that, the court has, in a limited way, factored it into the mix in situating the sentence for the offence against EH at the lower end of the range which I will describe later on—*Knockwood* at ¶ 29 and 33; *R v Kennedy*, 2021 NSSC 322 at ¶ 26.

Sentence parity

[71] This principle is codified in ¶ 718.2(d). Parity requires that similar offenders who commit similar offences in similar circumstances receive similar sentences. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality: *Friesen* at ¶ 32; *R v Parranto*, 2021 SCC 46 at ¶ 11.

[72] In reviewing cases submitted by counsel and those which I reviewed in conducting my own research, I have identified the following as offering reasonable parity guidance:

Citation	Synopsis	Sentence imposed
R v CMS, 2022 NSSC 166 [*CMS*]	Conviction for § 151 offence following jury trial; four instances of sexual touching over three months, including one instance of vaginal touching over clothing, and one under clothing. A trust relationship of short duration. Convicted following trial. No criminal record. CMS was 28 years old at the time of the offence; the complainant was under 14 years of age. Favorable PSR and good prospects for rehabilitation.	24-month penitentiary term, 3-year probation order, ancillary orders.
R v Wood, 2021 NSSC 253 [*Wood*]	Accused pleaded guilty to charges of 151, 163.1(2) (making child pornography), and 92(1). Mr Wood was a 24-year-old offender who met the 15-year-old victim through Snapchat. They agreed to meet on two separate occasions. Mr Wood picked up the victim in his car and	3.5 years for § 151; 1-year consecutive sentence for § 163.1(2).

	brought her to his place where he supplied her with alcohol and drugs. Vaginal penetration occurred on multiple occasions during each of the two visits. He took videos and photos. He had a limited criminal record but with some convictions for violence.	
R v TKB, 2022 NSSC 150 [*TKB*]	Conviction recorded for § 151 following judge alone trial; § 271 count stayed; 2 instances of snapping victim's bra, an incident of pinching her buttocks over the clothes and then trying to hug her and pull away a blanket she was using to cover herself; an incident of pinning her wrists to a wall and licking her face. Victim was 14-15 years old. Accused 56 years old at time of sentencing. No prior criminal record.	12-month term of imprisonment, probation, and ancillary orders.
R v Storey, 2021 ONSC 1760 [*Storey*]	21-year-old accused with a significant intellectual disability had a brief sexual relationship with a 13-year-old female. Good prosects for rehabilitation and a long history of willing participation in therapeutic counselling.	45-month sentence for a count of § 151; an additional 15 months imposed for counts of §266, 163.1(4) (child pornography), and 171.1 (supplying sexually explicit material to a minor); these sentences were fixed after granting

		the accused a 12-month credit for pre-trial custody and for four years of house arrest.
R v M(CJP), 2022 NSSC 315 [*M(CJP)*]	Accused convicted of single count of sexual assault following judge-alone trial, reported at 2022 NSSC 253. While lying in a bed with the victim (who was impaired by beverage alcohol), the accused engaged in a single act of non-consensual sexual intercourse. The accused, a young adult male, had no record, was engaged, enjoyed good health, and was active in his community. Good prospects for rehabilitation.	The court accepted a joint recommendation for a two-year penitentiary term, a 2-year term of probation, and ancillary orders.
R v MacDermid, 2022 NSPC 38 (under appeal)	The accused, aged 20 at the time of the offence and 24 at sentencing, pleaded guilty to sexual interference with a 12-year-old girl. He put his penis in the victim's mouth until he ejaculated. The accused admitted to being reckless as to the girl's age. The events had a profound effect on the victim: she felt manipulated by the	Following a contested sentencing hearing, the Court imposed a 2-year term of imprisonment, followed by a 3-year term of probation.

	accused. Afterwards she experienced anger, sadness and social isolation. Her mental heath deteriorated, and she received clinical antidepression treatment. The accused's childhood was unstable and somewhat chaotic. He described experiencing physical abuse and lack of emotional support. He struggled in school and was suspended several times. He did not complete grade 12. He was bullied. He had a history of chronic mental-health diagnoses including ADHD, reactive-detachment disorder and conduct disorder. He had held general-labour jobs, and was receiving income assistance at the time of sentencing. The sexual-behaviour assessment revealed a sexual preference for girls in the range of 12 to 15 years of age. He avoided responsibility for the offence with the clinician.	
R v CAL, 2021 NSSC 365 [*CAL*]	Accused was convicted following trial of a count of § 151. The victim	3.5 year term of imprisonment imposed.

	recalled frequent sexual violence consisting of touching, kissing, and the accused laying on top of her. The accused did not accept responsibility and he maintained his innocence. He had not participated in, nor explored, sex offender assessment or counselling. This diminished the prospects of his rehabilitation. The sentencing judge found that accused to have been in a position of trust. The prosecution recommended a 3.5-4-year federal term. Defence recommended a conditional sentence order.	
R v Cameron (31 October 2022), Pictou 8455773 (NSPC)	Accused convicted following trial of one count of sexual interference and one count of breach of bail. The victim was a resident of the same group home as EH and KB.	48-month term of imprisonment for the § 151 count; 2-month term for the § 145 count. The court reduced the term for the § 151 count by 41 months to account for pre-trial detention.
R v Bonnar (3 March 2022) Pictou 8449876 (NSPC)	Accused pleaded guilty to two counts of sexual interference, one count of possession of child pornography, one count of obtaining material benefit from sexual services, and one count	The court imposed a jointly recommended go-forward penitentiary term of 58 months. But for the remand time, the sentence would have been an additional 400 days.

	of breach of probation. Mr Bonnar and Mr MacDonald were roommates. These offences occurred at the same time as Mr MacDonald's. One of the victims was EH. The other was a resident of the same group home as EH and KB.	

Determination of sentence

[73] In my view, the proper range of penalty in this case for the § 151 count involving EH is a term of imprisonment of 4-4.5 years. While greater than the terms imposed in *MacDermid* and *CAL* it reflects the fact that the level of sexual interference in this case was greater, and Mr MacDonald has a prior finding of guilt for a sexual-related offence. It is in line with *Cameron* and *Bonnar*. Had this case involved an element of trust, I would have found the range to be 4.5-6 years.

[74] The proper range of penalty for the § 151 count involving KB is a term of 9-12 months, which I find in line with *TKB*.

[75] The proper range of penalty for the § 733.1 offence, as it involves breaching a court order, is a sentence of 3-6 months, in line with *R v Young,* 2014 NSCA 16

at ¶ 27, and *R v Graham*, 2022 NSPC 42 at ¶ 42; I take into account the fact that this was not a trivial or technical breach.

[76] In determining an appropriate sentence for each count, I take into account the following *Friesen*-designated factors:

- Likelihood of the person being sentenced to reoffend: based on the assessment, and Mr MacDonald's record for sexual assault, Mr MacDonald poses an elevated risk for reoffending.
- Abuse of position of trust or authority: There is no evidence that Mr MacDonald exerted authority over EH or KB; nor is there evidence of a trust relationship with them, as comprehended in *R v Audet*, [1996] 2 SCR 171.
- Duration and frequency of the abuse: Mr MacDonald had sexual intercourse with EH over a two-week period; his intimate contact with KB occurred over an indeterminate duration between January and July 2020.
- Age of the victims: both were 15 years old; they were vulnerable young persons who were residents of a local group home. Mr MacDonald was wantonly reckless about their ages.

- Degree of physical interference: Mr MacDonald had full, unprotected sexual intercourse with EH; he was physically intimate with KB, but did not have sexual intercourse with her.

Imposition of sentence

[77] Having weighed these factors, along with the previously reviewed governing principles of sentencing, the Court imposes sentences as follows:

- Touching EH for a sexual purpose (§ 151, information 806310, case 8450076): a 4-year term of imprisonment in a federal penitentiary.

- Touching KB for a sexual purpose (§ 151, information 807763, case 8455935): a one-year term of imprisonment in a federal penitentiary, to be served consecutively to case 8450076.

- Breaching the keep-the-peace condition of a probation order that was made on 1 February 2018 (§ 733.1, information 807763, case 8455939): a 6-month term imprisonment in a federal penitentiary, to be served consecutively to cases 8450076 and 8455935. The Court will grant a 1-month credit for the period of time that Mr MacDonald was subject to pre-trial detention. As a result, the net sentence for this count will be 5 months in a federal institution, to be served consecutively to cases 8450076 and 8455935.

[78] This results in a total sentence of 5 years and 5 months, which I do not consider unduly long or harsh; I find it in line with comparator sentences.

[79] The warrant of committal and the JEIN record will be endorsed to record the one-month remand credit applicable to case 8455939.

[80] The duration of the sentence would render the imposition of victim surcharge amounts an undue hardship, and they are waived.

[81] There will be a § 743.21 non-communication order endorsed on the warrant of committal. While in custody, Mr MacDonald is to have no contact with EH or KB (their full names will be recorded in the endorsement).

[82] There will be a primary-designated offence DNA-collection order in relation to cases 8450076 and 8455935.

[83] There will be a lifetime § 109 prohibition order in relation to cases 8450076 and 8455935.

[84] There will be a 5-year § 161 prohibition order to be drafted by the prosecution.

[85] Cases 8450076 and 8455935 are primary offences under § 490.011 of the *Code*; at the time of the commission of those offences, Mr MacDonald was

subject to a SOIRA order, JEIN order # 2052478; accordingly, there will be a lifetime SOIRA order pursuant to § 490.013(6).

[86] The Court thanks counsel for their thorough submissions.

Atwood, JPC