**PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** *R. v. Clarke*, 2024 NSPC 34

**Date:** 20240222
**Docket:** 8585645, 8585646, 8585647
8585649 & 8585651
**Registry:** Kentville

**Between:**

His Majesty the King

v.

Bradley Clarke

**Restriction on Publication: Any information that might identify the complainant shall not be broadcast or transmitted in any way – section 486.4 *Criminal Code of Canada***

# SENTENCE DECISION

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| **Judge:** | Associate Chief Judge Ronda van der Hoek |
| **Decision:** | February 22, 2024, in Kentville, Nova Scotia |
| **Charges:** | Sections 172.1(1)(b), 172.1(1)(a), 286.1(2), 286.1(1) and 145(4)(a) of the *Criminal Code of Canada* |
| **Counsel:** | Alicia Kennedy, for the Crown<br>Pavel Boubnov and Meg Green, for the Defence |

**Section 486.4**

**486.4(1) Order restricting publication — sexual offences**
Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
(a) any of the following offences:
(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
(iii) [Repealed 2014, c. 25, s. 22(2).]
(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

**486.4(2) Mandatory order on application**
In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
(a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;
(b) on application made by the victim, the prosecutor or any such witness, make the order; and
(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

**486.4(2.1) Victim under 18 — other offences**
Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

**486.4(2.2) Mandatory order on application**
In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall
(a) as soon as feasible, inform the victim of their right to make an application for the order;
(b) on application of the victim or the prosecutor, make the order; and

(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

**486.4(3) Child pornography**
In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

**486.4(3.1) Inquiry by court**
If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall
(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;
(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and
(c) in any event, advise the prosecutor of their duty under subsection (3.2).

**486.4(3.2) Duty to inform**
If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have
(a) informed the witnesses and the victim who are the subject of the order of its existence;
(b) determined whether they wish to be the subject of the order; and
(c) informed them of their right to apply to revoke or vary the order.

**486.4(4) Limitation**
An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or
(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

**486.4(5) Limitation — victim or witness**
An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

**By the Court:**

***Introduction***

[1] Mr. Clarke is before the Court for sentencing on six *Criminal Code* offences, involving two adults and two young people.

[2] The Crown and the defence are not *ad item* with respect to a fit and proper sentence, but jointly request some ancillary orders. I grant a primary *DNA Order*, a s. 109 *Firearms Prohibition Order* for 10 years, a s. 161 Order with conditions a, a.1, b, c, and d for 20 years, and a *SOIRA Order* for 20 years. I declined to order forfeiture of Mr. Clarke's cellular phone because the parties agree it has no connection to the offences. That item will be returned to Mr. Clarke.

[3] Both parties sought a federal period of incarceration - the Crown six years and ten months and the defence between two and two and a half years. After considering submissions of counsel, including written submissions from former defence counsel Ms. Meg Green, reviewing relevant case law, assessing the particulars of each matter, and reflecting on the purposes and principles of sentence, I find a fit and proper sentence for Mr. Clarke is as follows:

(i) fines of $1,000.00 and $2,000.00 for two offences involving two women, pursuant to sections 286.1 *Cr. C.*;

(ii) six months incarceration for one offence pursuant to s. 172 *Cr. C.* involving a seventeen-year-old girl; and

(iii) two years concurrent on each of sections 172 and 286 *Cr. C.* involving a fifteen-year-old girl, and six months concurrent for a related s. 145 offence.

The latter sentences, (iii), will be served consecutive to the six-month sentence, (ii), resulting in 30 months incarceration. Since Mr. Clarke has been on remand, never having sought a bail hearing, for the equivalent of 2.7 years (31 months), he will be released today. These are my reasons for reaching such conclusions, but first the facts.

[4] The following is a summary of the circumstances of each offence, the sentence sought by the parties, and that imposed by the Court.

*Circumstances of the offences*:

*A. Soliciting two adult women*:

(i) ST:

[5] On a date between **December 29, 2021, and January 23, 2022**, Mr. Clarke communicated with ST, an adult stranger, on her Facebook account offering her $300 to watch him masturbate online. She declined and there was no further contact. He pled guilty to a charge of communicating for the purpose of obtaining sexual services for consideration, contrary to section 286.1(1) *Cr. C.*

[6] The Crown sought 30 days incarceration; I impose a fine of $1,000.00. ST, who was interviewed for the purpose of the presentence report, says she had no prior knowledge of Mr. Clarke, assumes he "found her" through the victims of the other

offences, and while she does not fear for her safety, would like to have no contact with him. Mr. Clarke professes no memory of the offence, as he was under the influence of drugs and alcohol over an extended period, and does not know ST.

(ii) JR:

[7] Between **January 1, 2020, and January 1, 2022**, Mr. Clarke responded to JR's online escort advertisement, and paid her $600 for two sexual encounters. He pled guilty to a charge of obtaining sexual services for consideration, contrary to section 286.1(1) *Cr. C.*

[8] The Crown sought 30 days incarceration. I impose a $2,000.00 fine. JR considered Mr. Clarke a close friend and told the author of the presentence report (PSR) he struggled with alcoholism and, while intoxicated, displayed questionable behaviour. She believes he requires help to address his mental health concerns. Mr. Clarke says while he paid JR for sex twice, the second time they simply talked. He viewed the situation as "helping each other".

*B. Charges involving two young people*:

(iii) KH:

[9] On a day between **January 1, 2022, and February 7, 2022**, Mr. Clarke communicated with KH, a stranger to him, on her Facebook account- access granted through mutual friends. She told him she was 17 years old, he led her to believe he was 24 years old and offered her $500.00 for sex. She declined and blocked him. He

plead guilty to communicating with a person under the age of 18 years for the purpose of facilitating sexual exploitation, contrary to section 172.1(1)(a) *Cr. C.*

[10] The Crown sought three years incarceration to be served consecutive to the previous matters. The defence sought one year in custody. There was no victim impact statement, but after considering the SCC direction in *R. v. Bertrand Marchand* and applying *Duncan* credit, **I impose six months incarceration**. Mr. Clarke professes no memory of this offence for the same reasons stated above and does not know KH.

(iv) HK:

[11] In 2021, JR, the previously mentioned friend and escort, introduced her fifteen-year-old daughter, HK, to Mr. Clarke. In her victim impact statement, JR described Mr. Clarke as a family friend who attended their residence from time to time. Sometime **between January 1, 2022, and February 7, 2022**, HK was residing in a group home, and "having some difficulties". She and Mr. Clarke messaged each other daily for a few weeks during which he told her he did not have a girlfriend, "No one likes me" and he has nobody with whom to have sex. He asked HK if she would variously have sex with him for $200, have phone sex, and/or provide sexy photographs. He also told her he wanted to have sex with girls (unspecified as to exactly what that meant, but the parties agree 'people under eighteen years'), obtain pictures of naked girls, engage in video chats, and have sex for money. He asked HK

if she knew any girls (once again age unspecified but concluded to mean ‘persons under eighteen years’) who would have sex in exchange for money and offered HK money, drugs, and alcohol if she could find such girls stating, "I will scratch your back if you scratch mine".

[12] While engaging in these communications, Mr. Clarke was subject to an undertaking with the condition not to communicate with persons under the age of sixteen.

[13] HK declined all offers and requests made by Mr. Clarke and no physical contact occurred between them. In her written submissions, Ms. Green added the following, "Mr. Clarke asked HK if she would have sex with him for $200. HK said no and laughed, and Mr. Clarke said, 'just kidding'. He asked if she could help find someone for him and he would pay her $200 and she refused. He left her alone after that." During submissions, Mr. Bobnov advised the Court he was relying on Ms. Green’s written submissions, and the Crown took no issue with its contents. I, however, failed to clarify whether the Crown agreed to include those specific submissions from Ms. Green’s brief, but find they do not, in any event, lessen the gravity of the offences.

[14] Mr. Clarke pled guilty to three offences arising from the above noted communications with HK - (i) communicate with a person under the age of 16 years, for the purpose of facilitating sexual interference with her, contrary to section

172.1(1)(b) *Cr. C.*, (ii) communicate with HK for the purpose of obtaining sexual services for consideration from a person under the age of 18 years, contrary to section 286.1(2) *Cr. C.*, and (iii) breach a condition of an undertaking that required him not to have contact with anyone under the age of 16 years.

[15] The Crown sought concurrent sentences of three and a half years on each of the first two counts and one year on the third, for a total sentence of three and a half years incarceration. The defence sought one year concurrent on each of the three counts. The Crown asked that the sentences be served consecutive to the other matters for a total period of incarceration of six years and six months. I impose a two-year period of incarceration on the first two counts and 6 months on the third to be served concurrent one to the other and consecutive to the six-month sentence for the matter involving KH. As a result, the total sentence for all matters is 30 months.

*Victim Impact Statements*:

[16] JR and HK filed victim impact statements (VIS), and JR also provided comment for the presentence report (PSR). JR confirmed a close friendship with Mr. Clarke that started in their early 20s and resumed in 2020 when he replied to her advertisement. The Court assumes her involvement with Mr. Clarke came to the attention of the police because of the three charges involving her daughter HK. She trusted and confided in him, considered him akin to family, and says his actions have deeply hurt her, and contributed to trust issues, anger, and numbness. She and her

daughter blame themselves for the incidents that in turn impact how she views herself as a mother. She is concerned, should he have access to the internet, that he may continue to engage with other young and vulnerable individuals.

[17] JR says writing the VIS was extremely difficult and painful, not just because of her own relationship with Mr. Clarke, but most importantly because of the impact his actions had on her daughter. Mr. Clarke "practically lived at my home on a daily basis for over a year with me and my partner. We had many barbecues, family outings, beach trips, movie nights, little parties with close friends". He was "one of my closest friends", and they shared their thoughts and feelings about their families and their children. He entrusted her with the complexities of his background and traumas and she stood beside him when things became difficult and complicated in his life, did not judge him, and tried to be there for him when others abandoned him. She believed they "shared a loyal and trusted friendship" and he understood her commitment and love for her daughter who she was trying to bring home from provincial care. It hurts her mind, body, and soul that he went behind her back to pursue her daughter, and his actions have left a mark on her and her family that will never go away. She was in shock when he was charged with the offences and later when he pled guilty. Finally, as a Christian she grieves his bad behaviour, but still loves Mr. Clarke and will continue to do so “as long as I am on the earth”. She

concludes with a belief that Mr. Clarke requires serious help and has a lot of work to do. She will pray for him.

[18] In her VIS, HK says "what Bradley did to me affected me in mental and emotional ways. It made me feel really uncomfortable and triggered ways I've been used by other people. It made me think, how could mom be friends with a person like that and was confusing to try to make sense of. It made me feel unsafe, very gross and disgusted. Just knowing that he was mom's friend made me think that maybe he was good in some way. I thought he was a good person at first. So, I kept it a secret for a while from mom and this put mom in danger and betrayed her trust behind her back with me. It made me feel really sad".

[19] Much of what JR and HK said constitutes the acknowledged harms set out in *Betrand* - foreseeable outcomes of luring offences.

*Criminal record*:

[20] Mr. Clarke has a short, dated, unrelated criminal record.

> 2019: impaired driving - fine and driving prohibition;
> 2018: exceed legal limit (s. 253 of the *Cr. C.*) - fine and driving prohibition;
> 2007: mischief - fine;
> 2005: assault- fine, assault (s. 267(b)) - 45 days, failure to abide by conditions of an undertaking - 15 days, and mischief - suspended sentence and probation for two years.

[21] The Court is told he took responsibility for all those offences that occurred while he was under the influence of alcohol.

*The PSR and Forensic Assessment*:

[22] Mr. Clarke's personal circumstances were addressed in both a PSR and a lengthy *Forensic Sexual Behaviour Assessment* (*Assessment*). The *Assessment*, prepared on March 24, 2023, addressed issues such as sexual deviancy, risk for sexual re-offence, history of mental health and addictions, as well as emergency room visits, personality, and treatment recommendations. It was comprehensive and required Mr. Clarke to spend two days in hospital completing the clinical interview, pen and paper tests, and a penile plethysmography assessment (PPG). He was described as pleasant, cooperative, and verbose, providing responses to all questions asked and his insight was described as fair. Not surprisingly, the *Assessment* was much more comprehensive than the PSR, but I will include information from both reports.

[23] At the time of arrest Mr. Clarke was 41 years old, recently divorced, homeless, and suffering from alcohol addiction and the effects of injuries sustained in a 2019 motor vehicle accident.

[24] He reported a close relationship with his father and paternal grandmother who remain in Mr. Clarke's home province, however the *Assessment* elaborated upon a weak bond with both parents and a childhood marked by their alcohol misuse, yelling, and screaming. Mr. Clarke explained that he had an "evil" and "bad mother, who did not offer him any affection or care", but instead subjected him to derogatory

name-calling and mental abuse. While his mother was raised in care, children services were never involved with Mr. Clarke and his siblings. Mr. Clarke reported last contact with his father at Christmas 2019, but his mother hung up the phone, and despite sending three letters from remand, they remain unanswered. A brother is similarly impacted by their upbringing and described as a heavy drinker and drug user.

[25] Fortunately, Mr. Clarke reported a positive relationship with extended family including an aunt, uncle, and a cousin, all confirmed by the assessor. Once the matters before the court reach their conclusion, he plans to return to his home province, reconnect with them, and work on his cousin’s boat.

[26] Ultimately the assessor concluded Mr. Clarke's formative years were "remarkable for neglect and verbal, mental abuse, parental substance abuse, witnessing parental conflict and the death of a sibling at a young age". The lack of emotional support and love from his parents, notably his mother, not surprisingly led to struggles in life and in school.

[27] *Marriage and romantic relationships*: Mr. Clarke has a child from a relationship that ended amicably. His marriage to the mother of his two youngest children ended in divorce in 2017. There are no reports of domestic violence or infidelity issues in either relationship. Due to the offences, Family and Children’s Services are currently involved with his youngest children.

[28] The assessor says Mr. Clarke's sexual history is unremarkable in terms of the age of sexual development. She concluded he uses sex as a coping method in response to boredom and unpleasant emotions and, based on a self report, his sex drive increases when he is intoxicated.

[29] *Employment*: Mr. Clarke has a long history of employment. He started fishing at age sixteen before leaving home for various blue-collar jobs in Alberta and Mr. Clarke says fishing "is in my blood". When he returns to his province of origin, he plans to reconnect with cousin and others who live drug and alcohol-free lives, and resume fishing.

[30] Mr. Clarke recognizes employment is a step toward regaining control over his life, paying child support, remaining sober, being a father to his children, and perhaps acting as a motivational speaker. He expressed concern for his children because he has been unable to provide for them while in custody, adding he is not neglectful of the children "because I know what it's like to be rejected". He has a strong desire to have a relationship with them in the future.

[31] Overall, Mr. Clarke described himself as a hard worker and a people person who kept busy on remand working as a cleaner and delivering food trays. He has, in the past, volunteered at the Open Arms Resource Centre Society, a Kentville shelter and resource center for those in need, served meals, and assisted senior citizens in

the community. That said, he also reported a history of job terminations and absenteeism due to drug use.

[32] *History of drug and alcohol use*: Mr. Clarke reported a concerning history of drug abuse that started when he was a teenager when he consumed "a lot" of alcohol and marijuana. By his mid 30's was using cocaine, heroin, methamphetamines, and acid, and since 2016, he was a daily user of methamphetamine or crack cocaine, and that continued into the summer of 2021 when he was smoking and injecting the drugs.

[33] Since being remanded in May 2022, he has been drug-free.

[34] The assessor chronicled a dramatic increase in substance abuse following the end of his marriage, and notes Mr. Clarke attributes alcohol addiction to the dissolution and eventual "loss of everything stable" in his life. By 2022 he had cashed out his workplace pension and was homeless.

[35] Mr. Clarke does have a recent history of seeking counselling for alcohol and other issues. In 2020 he attended a three-month treatment program and participated in AA but found the latter unhelpful. He intends to resume both addictions counselling and AA upon release. He reports benefiting from alcohol counselling while on remand to such a degree that he asked the Court, on one occasion, to reserve this sentence decision so that he could complete the program. That said, Mr. Clarke acknowledges occasional thoughts of alcohol, but plans to abstain in future and seek

support from AA, friends, and possibly religion. He acknowledges impulsiveness when drinking.

[36] Mr. Clarke was unable to say whether he has a drug addiction but reiterated a desire to remain sober once released from custody "not just because it ruined my life, but I want to preach to others that it is possible". He understands addiction has greatly affected his ability to make proper life choices, and counsel emphasized Mr. Clarke's commitment to battle all addictions.

[37] *Health and medical*: Mr. Clarke reports reasonably good physical health, while suffering from depression, anxiety, and prior suicidal ideations for which he is prescribed medication. He acknowledged a previous decision to self medicate those conditions with illicit drugs and alcohol. A psychological test confirmed depression and low morale along with anxiety and worry about the future. He scored in the severe depression range, feels disappointed in himself and is self-critical. He expects to be punished and has feelings of worthlessness.

[38] Records reviewed by the assessor confirmed numerous emergency department visits since 2020 for worsening symptoms of depression and suicidal ideation, and intercessions by friends and his former wife. The assessor confirmed a history of suicidal ideation with one past attempt, and all appear connected to the end of a relationship and follow the effects of a 2019 car accident.

[39] Mr. Clarke says, since being incarcerated, he has not had thoughts of suicide. His counsel submits Mr. Clarke understands that he needs to monitor his mental health and continue to seek support in the community.

[40] *Motor vehicle accident*: A 2019 motor vehicle accident resulted in nine days hospitalization with injuries to Mr. Clarke's head, eyes, and face as well as a fractured sternum and fractured vertebrae. This appears to mark a point when his inhibitions decreased, and others noted a behaviour change. Mr. Clarke reports experiencing watery eyes and memory issues since the accident; he is currently prescribed Gabapentin, pain medication for his back, and Zopicone for sleep. The assessor observed a large lump over Mr. Clarke's left eye, attributed to a recent fall in the institution when he hit his head on the floor, but she also noted significant scarring above his right eye attributed to the motor vehicle accident. During the assessment Mr. Clarke evidenced a struggle with his memory but was unable to say if this was caused by the head injury sustained in the accident or multiple years of substance abuse. While defence counsel was not prepared to speculate about the impact of the accident on Mr. Clarke's behaviour, it seems clear that his friend, interviewed by the PSR author, and Mr. Clarke himself ascribe noticeable impacts to his judgment.

[41] The friend says she has known Mr. Clarke for seven years and described him as a generous person who changed significantly after the accident which also

impacted his mental health. She has tried to be supportive, believes his coping mechanisms have been alcohol and cocaine, and believes he would not have engaged in the offences before the Court but for the automobile accident and recommends support to address his mental health.

[42] *Attitude toward the offences*: Mr. Clarke explained to the assessor that HK initially messaged him on Facebook messenger asking if he had alcohol and drugs. Her mother messaged telling him to delete HK as a contact but did not explain why. He deleted the conversation but did not delete HK because he was unsure how to do so. Mr. Clarke says HK messaged him a few more times asking for drugs or alcohol, and he did not recall ever offering or providing her with same. He had no recall of asking her for a picture or offering her money for sex. Overall, although he did not categorically deny committing the offences, he says he cannot recollect them, but surmised it is possible he engaged in the behaviours because he was angry with JR, and he knows "how hateful I get when I'm drinking".

[43] With respect to KH, Mr. Clarke says he does not know her and has no recall of engaging with her online. He acknowledges it was a bad point in his life but questioned why he would make the request given the availability of escort sites.

[44] Regarding ST, Mr. Clarke also says he has no recollection of communicating with her. He did however acknowledge that he does occasionally send friend requests to people he does not know.

[45] That said, the assessor reports Mr. Clarke expressed empathy for the two underaged victims and shared a belief his actions likely caused a mental impact on them. He was quite tearful when describing his level of remorse and the assessor says a capacity for empathy highlights an absence of callousness.

[46] Regarding JR, Mr. Clarke confirmed their close friendship.

[47] So, to summarize Mr. Clarke was open to the possibility all the offences occurred as described but says his recall is impacted due to his level of intoxication at the time. The assessor could not rule out using alcohol to not only deny recall but also to explain his actions - "I would never do that in my right mind". Nonetheless, Mr. Clarke pled guilty to the charges, but "denied … attraction to pubescent sexual development and surmised that he would not have followed through had HK, KH or ST agreed to his requests".

*Assessor conclusions*:

[48] The communication between Mr. Clarke and HK highlights an apparent craving for love and support, point to his self-concept as someone who is unlovable and inadequate, and could point to the reason he appeared more focused on casual sex versus seeking a committed partner.

[49] He self medicated with alcohol and drugs to deal with emotional distress, and his long history of substance abuse is exacerbated when he experiences emotional distress. But a cycle of feeling guilty and anxious, and a fear of consequences, does

not necessarily reflect an actual internalized moral code and the feelings do not last. If accurate, this does not bode well for serving as a deterrent for future acting out behaviours.

[50] The PPG test was terminated when Mr. Clarke became very emotional after seeing sexual stimulus depicting children, and while he insisted that he would continue, a clinical decision was taken that the risk of harm to him outweighed the potential benefit of continuing the test. There is no indication Mr. Clarke was being uncooperative, but without the test results it is difficult to ascertain if a deviant sexual interest was a motivator to offending. However, based on his self-reported sexual history there is no information to suggest inappropriate sexuality toward underage females prior to 2020. As such, it seems plausible that a deviant sexual interest was not a primary motivator to his offending; rather, it is suggested he was not deterred by the victim's young age in his quest for sexual contact.

[51] While fabricating his own age on one of his Facebook profiles suggests he was actively seeking someone younger and perhaps more vulnerable, also soliciting adult aged females supports indiscriminate selection of sexual partners, “[O]verall, it seems Mr. Clarke's offending behaviour was primarily motivated by a desire for sex, and he was largely indiscriminate about who he would engage in sex with”. Supporting this conclusion the assessor points to “his decision to offer HK compensation if she would find him some girls with whom he could have sex [and

no specifiers were given]". She concludes, "it seems Mr. Clarke's offending behaviours involved an attempt by him to manage a negative affective state - one of depressed and anxious mood… [and] (s)imilar to substance use, Mr. Clarke reported that he occasionally used sex to cope with unpleasant emotions".

[52] Mr. Clarke is impulsive and has a history of making decisions without thinking through the potential consequences. He lives in the here and now and appears to struggle to learn from the negative consequences of his behaviour, i.e. despite a conviction for impaired driving, Mr. Clarke was involved in two car accidents involving alcohol. He is easily bored, and a risk taker who lacked structure at the time of the offences. That said, once released, he does have a desire to implement some healthy structure and activity into his life. Mr. Clarke is also amenable to addictions counselling and understands he could benefit "from addressing other criminogenic variables such as the implicit theories to which he subscribes, deficits and general self-regulation, ineffective coping strategies, general lifestyle impulsiveness, and intimacy deficits". He is best suited for intervention at an intensity that is higher than that offered by the Forensic Sexual Behaviour Assessment Program. Community alternatives and resources should include counselling for mental health and substance abuse issues and sexual behaviours. His risk in the community is above average given the complex intermingling of depression and use of drugs and alcohol to manage depression that led to

indiscriminate sexual activity to avoid negative feelings. While treatment for his complex needs may not be available in the community, he must abstain from the use of alcohol and drugs to avoid recidivism.

[53] *Acceptance of responsibility and allocution*: Mr. Clarke says the past three or four years have been a blur for him, and he is ashamed of how he allowed substances to take over his life. It took time to accept responsibility for his actions because he could not recall the details, particularly the messaging. While initially unable to provide insight into how his actions impacted the victims, he eventually told the author of the PSR that it was "probably not very good". These comments appear to be in line with his initial guilty pleas, some delay to consider an application to withdraw them, and finally this resolution.

[54] Mr. Clarke read to the Court a prepared statement noting he is deeply sorry to the victims and their families for his terrible behaviour described as “uncalled for”. Addressing JR and HK, he explained that he was very close to JR, and she was a great friend. He confirmed that their friendship ended because of his drinking and drug use, and as a result he lost “a piece of my heart”, and for that he is sorry. He is also sorry for the pain and disappointment he caused to her and everyone.

[55] Mr. Clarke explained that prior to being placed on remand he was under the influence of alcohol and drugs for many years and this abuse took him “down a dead-end road that I never want to venture down again”. He says being sober the last 21

months and seeing what he has lost in his life has helped him to understand how much he has let down people, including himself. He says he is very thankful that jail helped him obtain the proper medications and the help he needed “to get better”. He said he is more than willing to accept whatever sentence the Court imposes and, when released, wishes to help others stay on a road to success.

*Applying the sentencing principles*:

[56] The fundamental purpose of sentencing is to protect society and contribute to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions. In imposing a just sanction for the offences before the Court, the objectives which the sentence should attempt to achieve include denouncing and deterring unlawful conduct and recognizing the harm done to victims and the community that is caused by the unlawful conduct.

[57] It is a fundamental principle of sentencing that the sentence imposed be proportionate to the gravity of the offence and the degree of responsibility of the offender. Assessing gravity requires the Court to consider each individual offence, and while the offences before the Court have common themes, they are different. The more serious the crime and its consequences, the greater the offender’s degree of responsibility and the heavier the sentence will be. (*R. v. Lacasse*, [2015] 3 SCR 1089)

[58] Addressing first the charges involving the girls. It should go without saying, but the Court states for clarity, *Friesen* requires a sentencing court to "impose sentences that are commensurate with the gravity of sexual offences against children", and not to simply state "that sexual offences against children are serious", but to impose a sentence that reflects the "normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities" (para. 76) - the objective and subjective gravity (para 96).

[59] The Supreme Court of Canada also offered guidance as to how a sentencing court can give effect to the gravity of sexual offences against children.

> Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.

[60] KH was seventeen years old when contacted by Mr. Clarke, in circumstances that were on the lower end of an indictable luring. Mr. Clarke reached out once, there was no prior relationship between the two and no ongoing communication afterward. The Crown says the fact KH said no and blocked Mr. Clarke does not lessen the gravity of the offence, such that a three-year sentence is required. I disagree.

[61] In *Betrand Marchand* the offender lured a fifteen-year-old, for the purpose of continuing previous sexual assaults he had committed upon her, using threats and

emotional manipulation. None of which is present on the facts before me. I make this point simply to demonstrate that luring captures a wide range of activity, some of which is fleeting as compared to that which is sustained, manipulative, and aggressive. The Court certainly accepts that the effect on KH could be surmised to include the range of possible harms suggested in *Bertrand*, but it is equally likely she was not impacted in a serious manner by such brief contact with a stranger, but instead simply offended. That said, the Court recognizes the potential harm that may flow from such an offer that could have led this young person to accept the money and thus take her down a troubling, vile, path of child prostitution- the societal evil Parliament is addressing with this criminal charge. Fortunately, that did not occur here because KH, on the cusp of adulthood, stood up for herself and refused to be involved with Mr. Clarke. There is no evidence of actual harm.

[62] While also considered under aggravating and mitigating circumstances, Mr. Clarke contacted KH while in a depressed state, suffering the effects of a personality change following a head injury sustained in a car accident, and while highly addicted to and consuming alcohol and drugs, and professing no memory of doing so. The contact was spontaneous, unplanned, and not prolonged. At para. 127 of *Bertrand* the Court said “It is well established that spontaneous or spur of the moment crimes should be punished less severely than planned or premeditated ones (see, *R. v. Laberge* (1995), 1995 ABCA 196 (CanLII), 165 A.R. 375 (C.A.), at

para. 18; *R. v. Murphy*, 2014 ABCA 409, 593 A.R. 60, at para. 42; *R. v. Vienneau*, 2015 ONCA 898, at para. 12 (CanLII))

[63] While the degree of exploitation may vary from case to case, the wrongfulness of the exploitation of children is always relevant to the gravity of the offence (*Friesen*, at para. 78). The Court accepts that Mr. Clarke's actions were deeply wrong, but considering the myriad number of ways this offence can be committed, this was not at the high end of seriousness, and certainly not as grave as the relentless behaviour of the offender *Betrand* whose five-month sentence the SCC increased to 12 months. In addition, Mr. Clarke's degree of responsibility is attenuated by his clinical symptomology, mental health issues, and impairment.

[64] With respect to HK, the same concerns are at play, however that situation is rendered graver due to the relationship he had with her family, the other offences committed at the same time, HK's particular vulnerabilities related to being a teenager under the care of the state and living in a group home, her struggles evidenced in her request for drugs and alcohol, and the effects set out in the VIS. She was a vulnerable 15-year-old child at the time of the offences and her mother reached out to Mr. Clarke asking him not to communicate with her daughter. That said, my comments with respect to Mr. Clarke's degree of responsibility are the same as previously stated.

*Gravity of the offences involving the adult women*:

[65] With respect to the two-adult woman, JR and ST, these offences are in no way as serious as those involving the girls. I should not be taken to be engaging in a comparative exercise, rather I am pointing out that the first adult woman said no to watching Mr. Clarke perform a sex act for money, and the other advertised sexual service to the world at large. Unfortunately, these are not unusual or uncommon offences, but rather run of the mill, and not particularly serious or grave on their particular facts.

[66] It is fair to say that not all people who prostitute themselves do so because they are being exploited by others, but as a society we recognize that in a free and democratic society those not at social disadvantage do not, as a rule, sell sexual intimacy to strangers. In *Canadian Alliance for Sex Work Law Reform v. Attorney General*, 2023 ONSC 5197 (CanLII) the court acknowledged "there are sex workers who have agency and freely choose to enter the sex trade," in this case JR had such agency to screen Mr. Clarke who she described as a close friend.

[67] Also, it is not unheard-of women being propositioned for sex, however adding a financial inducement crosses the line into criminal conduct. ST was not herself asked to perform a sexual act for money, but to instead remotely observe Mr. Clarke do so.

[68] The impact of the offence on JR, if any, was not addressed in her victim impact statement that focused exclusively on the matter involving her daughter. ST

did not file a VIS, but I can at least infer she was offended by Mr. Clarke's request. So, also considering Mr. Clarke's circumstances at the time, I conclude the gravity of both offences is relatively low.

*Aggravating and mitigating circumstances*:

[69] The Supreme Court advises sentencing courts that understanding the wrongfulness and harmfulness of luring is integral to properly assessing the gravity of the offence and the degree of responsibility of the offender, as well as avoiding stereotypical reasoning and the misidentification of aggravating and mitigating factors (para. 50 *Friesen*). With that in mind, I assess the mitigating and aggravating factors of all the offences.

[70] Mitigating factors:

(i) guilty pleas entered in the absence of memory of some offences;

(ii) young witnesses did not have to testify at trial or at a Gardiner hearing;

(iii) limited but unrelated criminal record, with alcohol addiction a factor in all;

(iv) insight gained through sobering on remand and undertaking alcohol counselling;

(v) participation and active contribution to the Assessment;

(vi) allocution demonstrating marked sense of shame in the presence of HK and her mother;

(vii) experiencing effects of car accident, which affected his mental health and inhibitions thus playing at least some contributory role in the offences, and representing a mental impairment at the time;

(viii) suffering from substance use disorder, coupled with the accident, imposed serious cognitive limitations on him thus reducing his moral culpability. (Friesen, at para. 91; Betrand at para. 73; and R. v. Wrice, 2024 NSCA 3, at paras. 72-76.)

(ix) using his substantial time on remand to reflect upon the offences;

(x) seeking to delay the sentence decision to continue institutional alcohol treatment course;

(xi) the challenging time spent on remand;

(xii) history of employment, such that he was afforded a pension;

(xiv) he did not harass or engage with the complainants, other than HK, beyond the initial communications and following their refusals to engage.

[71] Aggravating factors:

(i) Abuse of a position of trust toward HK, as a family friend and confidant of her mother;

(ii) encouraging HK to send sexy pictures (Bertrand at para. 79);

(iii) contacting adolescent girls, per s. 718.2(a)(ii.1) Cr. C.;

(iv) abuse of a person under 18 years - a statutorily aggravating factor;

(v) The difference in age between Mr. Clarke and the two girls;

(vi) HK was particularly vulnerable to exploitation, being a child in care;

(vii) HK's mother told Mr. Clarke not to communicate with her;

(viii) The random nature of reaching out to a stranger, ST, on her Facebook account;

(ix) The number of offences committed over a short period of time. Although it is impossible to know exactly when each occurred. Given the broad date range, it cannot be ruled out many occurred the same day;

(x) The potential impacts of these offences, as set out in Bertrand, and explained in the victim impact statements; and

(xi) The Assessment finds a moderate risk to reoffended when affected by emotional loss and drug and alcohol addiction.

[72] Ms. Green also highlighted the absence of typical aggravating circumstances at page 10 of her brief "there was also no evidence of other aggravating factors often found in similar cases such as grooming, a request to keep silent, or any threats of violence or threats to disrupt the family unit as a means of ensuring silence. The courts have long recognized these factors are aggravating and they do not exist in the case at bar."

*Parity*:

[73] The parity principle requires similar offenders who commit similar offences in similar circumstances to receive similar sentences. That said, it is rare to find reported decisions involving spot on similarities, and a sentence must ultimately reflect the unique circumstances of the offence and the offender. In aid of applying the parity principle, the Crown asked the Court to consider five decisions: *R. v.*

*Friesen*, 2020 SCC 9; *R. v. Chaisson*, 2024 NSCA 11; *R. v. Alcorn*, 2021 MBCA 101; *R. v. Butera*, 2021 ONCJ 155; and *R. v. Clements* [2021], ONCJ No. 1829.

[74] *Friesen* directs sentencing courts to recognize the increasing penalties contained in the Code, *impose sentences that* reflection the gravity of sexual offences related to children, consider the need to protect children from exploitation and the risks associated with the ubiquitous use of technology that affords predators unprecedented access to children, understand the resultant harms realized by children and also their communities, and appreciate the impact these offences have as children move into adulthood. (variously at paras. 47, 60, 61, 114).

[75] *Alcorn* was also advanced as persuasive authority for considering the gravity of the offences and the risk presented to young people. (paras. 14, 41-43).

[76] *Butera* was recommended for sentence range and said to support a sentence of 30 months for luring. That case involved a man communicating with a mother for the purpose of sexually abusing her four-year-old for cash and is certainly, I find, distinguishable on its facts.

[77] I am cognizant that the SCC in *Lacasse* reminds "[t]o the extent that there exist pre-established sentencing ranges, they are guidelines, not straight-jackets".

[78] *Clements* involved a 30-month sentence for luring a seven-year-old including sending her explicit material and a video of himself masturbating, all in the face of a caution from police years before, a diagnosis of pedophilia, persistent luring over

an extended period of time, and the mother telling him to stop. These facts are not at all similar to the matter before this Court, and easily distinguished.

[79] Ultimately, the Crown argues the takeaway from the Supreme Court of Canada is "mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances". I, however, note that *Friesen* was not a case about luring, instead the Supreme Court of Canada specifically addressed luring in *Bertrand*.

[80] The Crown points to paragraph 114 of *Friesen* in support of three and 3 ½ year sentences.

> We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim, as in this case, Woodward, and L.M. In addition, as this Court recognized in L.M., maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it (para. 20).

[81] In my opinion, the court was addressing sentencing for sexual assault. I say this, because *Bertrand*, once again, involved much more serious circumstances than those before this Court, and the Supreme Court of Canada increased sentence from five-months to 12 months, certainly not a mid-single digit penitentiary term. In imposing 12 months, the court said, "there was no justification for departing from

the existing sentencing range of 12 to 24 months for luring cases proceeding by indictment". (para. 70)

*Case law submitted by defence:*

[82] Defence counsel acknowledges *Friesen* "changed the landscape of sentencing with regards to sexual assault offences against children". The decision recognized the need to protect children from wrongful exploitation and harms as the overarching objective of the legislative scheme. Sentencing courts are directed to impose sentences that recognize and reflect both the physical and psychological harm caused by sexual offences committed against children. What has not changed is the fundamental purpose of sentencing which to protect society and 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 denunciation of unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct, and to deter the offender and other persons from committing the offences.

[83] Defence counsel cautions the Court that *Friesen* directs an upward departure from prior precedents and sentencing ranges may be required to impose such a sentence, however, the Supreme Court expressed specific concern about sentencing ranges based on precedents that appear to restrict a sentencing judge's discretion. He argues the SCC was not directing an inappropriate and artificial constraint on a

sentencing judge's ability to impose proportionate sentences. Instead, it is not the role of the court to establish a range or to outline in which circumstances substantial sentences should be imposed, nor is it appropriate for the court to set binding or inflexible quantitative guidelines for sentencing judges. (*Friesen,* at para. 114) Instead, sentencing judges must retain the flexibility needed to do justice in individual cases and to individualize the sentence to the offender who is before the court.

[84] Defence counsel argues *Friesen* signalled factors that sentencing judges should consider in determining a fit sentence including: abuse of a position of trust or authority, duration and frequency of the offending behaviour, the age of the victim, and the degree of physical interference. The court directed sentencing judges to recognize the societal scourge of sexual violence even in cases where the degree of physical interference is less pronounced, while confirming increases in the degree of physical interference increases the gravity of the sexual violence. (at para. 145) counsel says the latter suggests an aggravating factor attracting lengthier sentences.

[85] Counsel also submits, that while *Friesen* is the latest benchmark case with respect to sexual crimes against children, pre-*Friesen* cases can and should be taken into consideration as well. She notes there are currently mandatory minimums in place with respect to soliciting, and submits those mandatory minimums are the starting point for the offences involving the adult women.

[86] Defence counsel asked the Court to consider *R. v. AB*, [2020] OJ No. 5810; *R. v. Moola*, [2021] OJ No. 2906; *R. v. Clarke*, 2021 NLCA 8; *R. v. Clement*, [2021] OJ. No. 1829; *R. v. Dhanna*, [2022] OJ no. 4270; *R. v. JR*, [2021] OJ No. 142; *R. v. Wickramasinghe*, [2022] OJ No. 3298; *R. v. Jissink*, [2021] AJ No. 194. They were summarized as follows:

[87] *AB* provides a useful discussion of pre-*Friesen* case law. *Moolla* addressed aggravating factors that supported a 3 ½ year sentence for a recidivist offender, on probation at the time of the offences for criminal harassment, a young child victim, the graphically sexual nature of his communications including a photograph of an erect male penis, an indication of a significant amount of planning, some degree of grooming, and finally the luring led to a planned meeting. The court also emphasized none of the common mitigating circumstances existed such as a guilty plea, insight into the offending behaviour, and a willingness to seek and accept treatment or counselling.

[88] *Clarke* is submitted in aid of the Newfoundland Court of Appeal adopting a conclusion lengthier sentences should be reserved for offenders who actually engage in sexual contact with children.

[89] In *Clement*, the court imposed a 30-month sentence for luring a 7-year-old that included sending videos of himself masturbating even after the child's mother told him to stop. *Dhanna* involved a three-year sentence for luring a 12-year-old and

compelling her to do sexual things to herself while he watched on a video chat. *JR* was sentenced to five years for luring his own child of incest. *Wickramasinghe* was sentenced to 180 and 910 days for internet luring of two children under the age of 16 and ultimately engaging in oral sex with one of them with substantial harm to the victims. *Jissink* involved a one year incarceration for a 43-year-old teacher who sent snapshots of a sexual nature to a 16-year-old student. All these cases suggest the Crown's request is much too high.

[90] The Court also considered what was described as post *Freisen* summaries, helpfully set out by Lynch J. in *R. v. Decoste*, 2024 NSSC 38:

> [21] Both counsel have provided the Court with post Friesen caselaw for sexual offences against children where the Crown proceeded summarily. Counsel have provided:
>
> (a) *R. v. T.J.*, 2021 ONCA 392 where the sentence for sexual assault against a young child in a position of trust was increased from nine months to 24 months on appeal.
>
> (b) *R. v. R.D.Z.*, 2020 BCPC 175 where a 53-year-old abused his step-granddaughter when the child was 8 years old and received a sentence of 18 months on the s.151 offence and 15 months concurrent on the s. 271 offence.
>
> (c) *R. v. D.B.S.*, 2021 BCPC where the step-grandfather in his sixties touched the 11-year-old and received 18 months for a s. 151 offence.
>
> (d) *R. v. M-M*, 2022 ABQB 197 an uncle who touched his 6-year-old niece's genitals had his sentence of 15 months for the s. 151 offence upheld on appeal.
>
> (e) *R. v. T.K.B.*, 2022 NSSC 150 where the offender was sentenced to 12 months of imprisonment for four incidents where

> the worst facts involved the offender licking the complainant's face and neck.
>
> (f) *R. v. R.A.-M.*, 2021 ONCJ 319 the offender touched the complainant several times for a sexual purpose while she was on a sleepover with the offender's daughter, and he received an intermittent sentence of 90 days.

[91] Based on a considered review of the foregoing case law, the Court concludes the range of sentence for the offences involving the girls ranges from a year to two years or more depending on the application of the principles of sentence.

[92] The court is reminded that *Friesen* provides direction to trial judges on giving effect to the principle of parity. At paragraphs 32-33:

> Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. 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 (R v L.M., 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 36-37; R v Ipeelee, 2012 SCC 13[2012] 1 S.C.R. 433, at paras. 78-79).
>
> In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.

*Restraint and totality*:

[93] Section 718.2 *Cr. C.* asks courts to impose a carceral period that is the least that would be appropriate in the circumstances.

[94] With respect to the solicitation offences involving the adult women, ST and JR, the mandatory minimums of $1000 for a first offence and $2000 for a second offence, adequately address these matters and accord with the purpose and principles of sentencing, including restraint. Such sentences are frequently imposed for soliciting an adult, and there is no reason to deviate from them and impose periods of custody. I would just add those mandatory minimum sentences do not even consider an ability to pay, much like the mandatory fines for impaired driving offences, and I found no support for a carceral sentence in any case law submitted during the sentencing hearing. These straightforward, low-end offences require fines that are high enough to render the activity prohibitive to undertake in future. The charges involving the girls are, however, a completely different matter.

[95] With respect to the offence involving KH, the 17-year-old girl, I find a fit sentence is 11 months. While recognizing the SCC in *Bertrand* said at para. 70 that the range for indictable luring is 12-24 months, considering the gravity considerations already addressed, and balancing the mitigating and aggravating factors, I find in the circumstances 11 months is a fit and proper sentence. Taking into account the *Duncan* credit for harsh presentence custody, I reduce that sentence to six months. I find there is no support for the three-year sentence sought by the Crown on these facts, the case law, or the circumstances. Instead having regard for all the considerations, I find the mitigating circumstances outweigh the aggravating

circumstances, and parity and proportionality, along with *Duncan* credit support such a sentence.

[96] In considering a fit and proper sentence for the offences involving HK, I considered *R. v. Webber*, 2019 NSSC 147 where, following trial for trafficking a sixteen-year-old girl to many men across the country over 4-6 weeks, the court imposed a three-year period of incarceration. How can this luring charge begin to compare. Three and a half years is simply unsupported, even taking *Friesen* harms and directions into account. *Betrand Marchand* followed the *Freisen* decision, involved luring, and saw the SCC overturn a five-month sentence in favour of twelve months on much more serious facts than those before me.

[97] With respect to HK, there is support for a longer period of incarceration than that imposed in relation to the other girl. I will pause to say I was surprised to determine at the sentencing hearing that Mr. Clarke had been on remand since 2022. As such I suppose it should come as no surprise the defence sought to achieve time served in sought a sentence in the range of two and two and half years. I accept that recommendation and impose two years on the first of two charges and six months for the breach. Such sentences also to some extent consider the harsh remand conditions.

[98] I also agree with the Crown that the three offences involving HK be served concurrently as they arise out of one transaction. As such, I find a fit and proper

sentence in the circumstances, for each, concurrent one to the other, is a total sentence of two years.

[99] Mr. Clarke has been in custody on these matters since May 2, 2022. The parties acknowledge the time spent on remand should be credited at 1.5 days for each day, in accordance with section s. 719(3.1) *Cr. C.*, and the difficult time spent at the Burnside facility during staffing shortages requiring the aforementioned *Duncan* credit of five months. The time spent on remand as of today - 662 days, multiplied by 1.5 is 993 days or 2.7 years.

[100] After deducting time served and the *Duncan* credit, he will be released today. I am unable to impose a period of probation given the imposition of a federal sentence.

[101] Judgment accordingly.

van der Hoek ACJ