PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Stewart*, 2013 NSPC 64

Date: 20130809
Docket:2365624, 2365625, 2365626, 2441275, 2418754, 2407391, 2407392, 2407394, 2407396
Registry: Pictou

Between:

Her Majesty the Queen

v.

Dennis Garry Stewart

SENTENCING DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Any information that could identify the complainants A.B., C.D., E.F., G.H., I.J. and K.L. shall not be published in any document or broadcast or transmitted in any way.

Judge: The Honourable Judge Del W. Atwood

Heard: 2 May, 31 July, 9 August 2013

Charge: Ss. 2 x 145(3), 2 x 152, 3 x s. 151, 172.1 *Criminal Code of Canada*. and sub-s. 5(1) of the *Controlled Drugs and Substances Act*

Counsel: Bronwyn Duffy, standing agent, for the Public Prosecution Service of Canada
Jody MacNeill, for the Nova Scotia Public Prosecution Service.
Rob Sutherland for Dennis Garry Stewart

By the Court:

Introduction and procedural history

[1] I wish to note at the outset of this sentencing decision that there are orders in effect under s. 486.4 of the *Code* prohibiting the publication of any information that might identify the complainants in these matters.

[2] Dennis Garry Stewart is before the court to be sentenced for an array of charges involving predatory sexual activity against children. This is the sort of case that the late Justice F. B. Woolridge of the Newfoundland and Labrador Supreme Court used to describe as being every parent's worst nightmare.

[3] The charges are:

> case number 2365624, a summary-offence charge of invitation to sexual touching under s. 152 of the *Code*; the complainant is A.B.; Mr. Stewart pleaded guilty to that charge;
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> case number 2365625, a summary-offence charge of touching for a sexual purpose under s. 151; the complainant is C.D.; Mr. Stewart pleaded guilty to that charge;
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> case number 2365626, a summary offence charge of s. 151; the complainant is E.F.; Mr. Stewart pleaded guilty to that charge;
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> case number 2441275, and indictable offence under s. 151; the complainant is G.H.; Mr. Stewart elected to have the charge dealt with in this court and pleaded guilty;
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> case number 2418754, an indictable charge of breach of undertaking under sub-s. 145(3), tied to case number

2441275; Mr. Stewart elected to have the charge dealt with in this court and pleaded guilty;

case number 2407391, an indictable offence of computer luring under para. 172.1(1)(b); the complainant is I.J.; Mr. Stewart elected to have the charge dealt with in this court and pleaded guilty;

case number 2407392, an indictable offence under s. 152; the complainant is I.J.; Mr. Stewart elected to have the charge dealt with in this court and pleaded guilty;

case number 2407394, an indictable charge of breach of undertaking under sub-s. 145(3) of the *Code* tied in to case nos. 2407391, 2407392 and 2407396; Mr. Stewart elected to have the charge dealt with in this court and pleaded guilty;

case number 2407396, an indictable charge of trafficking in a substance held out to be clonazepam, a schedule IV substance, contrary to para. 5(1) of the Controlled Drugs and Substances Act; Mr. Stewart elected to have the charge dealt with in this court and pleaded guilty.

Facts supporting the charges

[4] The facts of this case are as uncomplicated as they are alarming. In the summer of 2011, Dennis Garry Stewart began contriving encounters with and grooming a number of under-sixteen-year-old males for the purposes of facilitating criminal sexual activity with them. He sought to smooth the way with promises and delivery of tobacco, alcohol and prescription drugs.

[5] Several–specifically C.D., E.F., A.B.,.–were particularly vulnerable adolescents as they were in the care of the Department of Community Services and lived at a local group home. Mr. Stewart knew this about C.D., E.F., and A.B.,

because he had them in his car in a parking lot next to the home. On 30 July 2011, he drove them out into the county; the only common-sense inference to be drawn from this is that Mr. Stewart wanted to avoid getting caught. Mr. Stewart gave these children beer to drink while he drove. He offered to perform fellatio on A.B. He fondled C.D.'s crotch area over his clothing. He did the same thing to E.F. Group home staff found out about what had happened soon after the young persons were dropped off by Mr. Stewart; staff called police, and members of the Stellarton Policing Service carried out an investigation. Informations alleging two counts of s. 151 and one count of s. 152 of the *Code* were sworn on 23 September 2011; Mr. Stewart wound up being arrested and was admitted to bail on a judicial undertaking through the Justice of the Peace Centre on the day the charges were laid. One of the bail conditions was that Mr. Stewart "not associate with or be in the company of any person under the age of 16 years".

[6] In late October 2011, Mr. Stewart picked up 15-year-old G.H. and drove him to the back of a cemetery lot. Mr. Stewart's vehicle was seen by a member of the public who was visiting the cemetery. Mr. Stewart told G.H. to drop his pants as he wanted to "suck" him. G.H. refused. Mr. Stewart then tried to undo G.H.'s belt. G.H. pushed Mr. Stewart away; Mr. Stewart kicked G.H. out of his car and G.H. walked home. The 23 September 2011 undertaking with the non-association condition remained in effect at that time. Based on a report from the witness in the cemetery, police conducted an investigation and interviewed G.H. in early December 2011. Charges of s. 151 and sub-s. 145(3) were laid on 9 February 2012. By that time, Mr. Stewart was in custody on charges from 8 January 2012.

[7] The charges from 8 January are, by far, the most serious. But for the prompt action of members of the New Glasgow Police Service, a 14-year-old boy would have been victimized further by a cunning sexual predator. On that date, police were contacted by the mother of I.J.. She reported that she was intercepting on her smart 'phone a record of alarming, real-time social-networking messages between her 14-year-old-son and an adult male; she did not know where her son was, and she was undoubtedly terrified of what might happen to him. These messages included graphic descriptions of an earlier sexual encounter involving the adult performing fellatio on the youth and wrapped up with a late-breaking invitation by the adult to meet secretly with the youth and one of his friends at a motel just off the highway in New Glasgow. This was accompanied by an offer by the adult to arrange a taxi ride for the youths, along with lures of alcohol, tobacco**,** clonazepam

and promises of more oral sex. Police acted quickly, and tracked down the motel, where, with the help of staff, they found Dennis Garry Stewart, I.J. and his 14-year-old friend K.L. in a room that had been reserved by Mr. Stewart. Inside the room, police found a quantity of prescription medication in a bag, including clonazepam, which is a Schedule IV benzodiazepine drug under the *Controlled Drugs and Substances Act*. I.J. told police that they had heard the police knocking at the motel-room door, but Mr. Stewart had said to ignore them. The September 2011 undertaking was still running. It is clear from the circumstances leading up to the arrest that something very bad was about to happen. The police got there just in time.

Chronology of sentencing-related proceedings

[8] Guilty pleas were entered by Mr. Stewart before Stroud J.P.C. on 11 March 2013. The court ordered the preparation of a pre-sentence report and a sex-offender risk assessment, and sentencing was adjourned to 2 May 2013.

[9] When the case resumed before me on 2 May 2013, certain formalities regarding re-election were concluded, and a statement of fact was read into the record by the prosecutors in accordance with the provisions of ss. 723 and 724 of the *Code*. Defence counsel canvassed very carefully and thoroughly with Mr. Stewart in open court the requirements of sub-s. 606(1.1) of the *Code* affirming Mr. Stewart's guilty pleas and his acknowledgment of the accuracy of the facts read into the record, with some minor clarifications.

[10] As the risk assessment had not been requisitioned after the 11 March appearance, defence counsel sought and the court re-issued an order for the preparation of a forensic sexual behaviour pre-sentence assessment. An assessment was filed with the court in July 2013 by Dr. Michelle St. Amand-Johnson, Clinical and Forensic Psychologist. During sentencing submissions on 31 July 2013, Mr. Stewart, through his counsel, acknowledged the accuracy of the facts attributed to him in the report. The court also had for review a pre-sentence report dated 25 April 2013. Mr. Stewart had been the subject of a s. 672.11-672.12 fitness and mental-disorder assessment in February 2012. Defence counsel objected to the report generated as a result of the assessment being received in evidence at the sentencing hearing; as the prosecutor did not oppose this objection,

I excluded consideration of that report entirely, including the excerpt of it contained in Dr. St. Amand-Johnson's report at page 17.

Evidence of uncharged offences

[11] The forensic sexual behaviour pre-sentence assessment contained a number of statements made by Mr. Stewart to the psychologist assessor. As I just noted, Mr. Stewart, through his counsel, admitted the accuracy of what he had revealed to Dr. St. Amand-Johnson. In some of those statements, Mr. Stewart disclosed a distant-in-time history of misconduct involving uncharged sexual offences against children. That specific disclosure is connected so very remotely to the charges before the court as to have no aggravating effect, in my view, although I certainly take it into account in evaluating the accuracy of the risk assessment, in accordance with the principles regarding the weight to be assigned expert opinion as set out in *R. v. Lavallee*.[1]

[12] Mr. Stewart revealed to the psychologist assessor that he had performed oral sex on G.H. on two or three occasions. This is found at page 28 of the assessment. In the statement of facts read into the record by the provincial prosecutor on 2 May 2013, there was no mention of anything of this nature having been uncovered by police in their investigation, an investigation which included the obtaining of a statement from G.H. I am not persuaded that I ought to treat this disclosure by Mr. Stewart as an aggravating factor, absent other supporting evidence; however, I will accept it as adding to the validity of the risk assessment.

[13] Mr. Stewart also disclosed to Dr. St. Amand-Johnson a sexual encounter with the complainant I.J. which occurred prior to the date of the offences set out in case numbers 2407391-2407396. This is described at page 28 of the assessment as a single occurrence of "oral sex". While it is true that Mr. Stewart is not charged with an offence arising from this incident, it is connected quite clearly to the para. 172.1(1)(b) and s. 152 charges of 8 January 2012, as Mr. Stewart made abundant reference to this earlier encounter in his on-line messages to I.J.; indeed, he used it as a means to entice I.J. into another encounter. The contents of these messages were read into the record at the start of the sentencing hearing on 2 May 2013, and the flattery Mr. Stewart employed with I.J. over the earlier sex act was

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[1] [1990] 1 S.C.R. 852 at 893.

utilized as much as the promises of rum, clonazepam and tobacco to coax I.J., into a secret rendez-vous at the motel. The question at this point is whether I ought to apply the provisions of para. 725(1)(c) in considering as aggravating these facts–admitted as accurate by Mr. Stewart through his counsel– which would have constituted the basis for a separate charge. I do not require the consent of the offender in order to do so, nor is it required that there be a specific application by the prosecution. Governed as I am by the principles of procedural fairness as outlined in *R. v. Larche*,[2] I conclude that the application of para. 725(1)(c) in this specific case would not result in an unfairness to the accused given the abundant evidence supporting proof of this prior encounter.

[14] Disregarding, *arguando*, what Mr. Stewart told the assessing psychologist, there is abundant evidence of the earlier sexual encounter with I.J. in the statement of fact put before the court by the prosecution at the start of the sentencing hearing. As I noted previously, the content of Mr. Stewart's on-line conversation with I.J. made copious reference to the earlier incident. It would be inconceivable that Mr. Stewart would fictionalize a sexual encounter with I.J. in conversing about it with, indeed, I.J. Mr. Stewart's narrative was rich in detail, and left very little to the imagination. The prosecutor rendered a word-for-word representation of that narrative, and clearly treated this earlier incident as an aggravating factor in his detailed sentencing submissions. Accordingly, there exists cogent and reliable evidence of this earlier incident allowing the court to conclude that its occurrence has been proven beyond a reasonable doubt; the earlier incident is connected closely to the charges before the court involving the complainant I.J. as the victim of that earlier incident was I.J.; the earlier incident was proximate in time to the charges before the court involving I.J. as I.J. and Mr. Stewart had known each other for only a very brief period of time; Mr. Stewart was put on notice of these facts at the start of the sentencing hearing when evidence of the earlier encounter was put on the record; Mr. Stewart acknowledged, through his counsel, the accuracy of the facts put before the court; the prosecution treated the evidence of the earlier encounter as an aggravating circumstance in his detailed sentencing submissions, affording defence ample opportunity to reply to or rebut the prosecution's position. Finally, it is clear to me that the application of para. 725(1)(c) would not operate as a prejudice to the prosecution in proceeding with a

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[2]2006 SCC 56 at paras. 47-57.

separate indictment based on the facts of this uncharged incident; this is because, if a charge were going to be laid, it would have gotten done by now. Accordingly, I apply the provisions of para. 725(1)(c) to those aggravating facts; pursuant to para. 725(2)(b) of the Code, I order and direct that the clerk of the court endorse information 647778 as follows:

> In accordance with paras. 725(2)(b) and 725(1)(c) in determining the sentence for case no. 2407391, I considered facts pertaining to an earlier sexual encounter between the offender and I.J. as disclosed in the statement of fact read into the record by the provincial prosecutor on 2 May 2013.

The effect of the age of the accused in determining a proper sentence

[15] Mr. Stewart is a seventy-one-year-old male in poor health. I keep in mind the clear direction to sentencing courts laid out by the Supreme Court of Canada in *R. v. M.(C.A.)*:

> [I]n the process of determining a just and appropriate fixed-term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural life span. Accordingly, in exercising his or her specialized discretion under the *Code*, a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender's expected remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value. But with that consideration in mind, the governing principle remains the same: Canadian courts enjoy a broad discretion in imposing numerical sentences for single or multiple offences, subject only to the broad statutory parameters of the *Code* and the fundamental principle of our criminal law that global sentences be "just and appropriate".[3]

[16] While I am satisfied that a mid-range penitentiary sentence might be stressful for Mr. Stewart, there is no evidence before me that it would extend

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[3][1996] S.C.J. No. 28 at para. 74.

beyond his life expectancy. As well, I have every confidence that Mr. Stewart, while imprisoned, will have access to all medical care that is appropriate.

Imprisonment as "warehousing"

[17] Defence counsel argued that the imposition of a penitentiary sentence would have the effect of "warehousing" Mr. Stewart, as he would be unlikely to participate meaningfully in rehabilitative programming. This proposition arose in the context of a submission made by defence counsel that the forensic sexual behaviour pre-sentence assessment had concluded that Mr. Stewart was not in need of the sort of intensive programming available only within the federal-penitentiary system. I interjected at this point in defence counsel's submissions to point out that the report seemed to me to say exactly the opposite, specifically at page 38. I advised defence counsel that the court was prepared to grant an adjournment to allow counsel to arrange the subpoenaing of Dr. St. Amand Johnson to allow her to be examined on the contents of her report. After being given an opportunity to consult with Mr. Stewart, defence counsel declined to seek an adjournment, and agreed that it was the conclusion of the pre-sentence assessment that, as Mr. Stewart was found to be an "approach-explicit offender", the treatment most appropriate in his circumstances would be that described as being of a moderate-to-high level of intensity available only within the federal-penitentiary system. However, defence counsel continued to put forward the warehousing argument.

[18] I consider it a truism that, even when it is the case that the best rehabilitative services appropriate for a particular offender might be found only in a penitentiary, that circumstance can not be utilized to render lawful a penitentiary sentence when such a sentence would fall outside the appropriate range. Sentences must be based on principals of proportionality, restraint, parity and the like; and while rehabilitation is a core principle under para. 718(d) of the *Code*, it cannot be contorted into justifying a penitentiary term just to make sure a prisoner might get into the right course.

[19] Having said that, the warehousing argument is equally invalid. As I have just stated, rehabilitation is one of the cornerstones of sentencing; to base a sentence on the assumption that an offender would hermitically opt out of it is as inadmissible as making rehabilitation the sole or overwhelming determinant.

Absence of victim-impact statements

[20] None of the young people victimized by Mr. Stewart sought to file victim-impact statements. Defence counsel suggests I infer from this a lack of victim impact. In fact, I draw the contrary inference. Sentencing courts may–indeed, in some cases, must–draw reasonable inferences regarding the impact of proven crimes upon victims.[4] I conclude that the impact of Mr. Stewart's predatory acts inflicted upon these young people is or will be profound. It is well within the common experience of the court that victims of sexually exploitative crimes will often experience overwhelming feelings of shame and regret which will account fully for their reticence in the sentencing process. Applying the principles set out in *R. v. R.D.S.*, I am satisfied that this is the sort of thing that, as a judge, I am well entitled to "know".[5] It might take years before the full weight of the abuse inflicted on these young people might be felt; but of the high level of victim impact, I have absolutely no doubt.

The abuse of prescription drugs

[21] This court is very familiar with the harmful effects of the abuse of prescription drugs, especially upon young people; I see such cases with pathetic regularity. These effects are inevitably amplified by an order of magnitude when a prescription drug–particularly a Schedule IV benzodiazepine–is utilised as bait to entice a young person into being sexually exploited.

Child victims

[22] Sub-para. 718.2(a)(iii) of the *Code* makes it statutorily aggravating for an offender to abuse a position of trust. I am unable to conclude beyond a reasonable doubt–and that is the standard of proof required by para. 724(3)(e) of the *Code*–that Mr.Stewart stood in a position of trust or authority toward his victims:

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[4]See, *e.g.*, *R. v. Cromwell* 2005 NSCA 137 at para. 44; *R. v. Whalen* 2011 ONCA 74 at para. 9; *R. v. D. (K.)* 2011 ONCJ 81 at para. 22; *R. v. Mattis*, [1996] O.J. No. 5127 at para. 7 (O.H.C.J.).

[5][1997] 3 S .C .R. 484.

he exercised no lawful authority over them; yes, G.H., E.F., J.L and A.B. drove around in his car, and I.J. and K.L. were invited into his motel room. However, applying the principles in *R. v. Audet*[6] , it is clear to me that being in a position of trust toward a young person means more than being a casual host.

[23] This does not end the analysis of statutorily aggravating factors, as the *Code* recognizes one more that is a central sentencing value in this case:

> 718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> . . .
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
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> . . .
>
> shall be deemed to be [an aggravating circumstance] . . . .

[24] These provisions codify what courts in this country have followed for generations. As was stated by my colleague Campbell J.P.C. in *R. v. E.M.W.*, a sentencing decision upheld by our Court of Appeal:

> Society reserves its strongest sense of revulsion for those who cross the legal and moral boundary into treating children as objects of sexual gratification. The treatment of a child in this way is an attempt to deny [his] basic human dignity. In the eyes of the adult the child is reduced to being a nameless "thing". [He] is

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[6]See *R. v. Audet,* [1996] S.C.J. No. 61at para. 39

> robbed of [his] childhood and [his] innocence. [He] has no choice in the matter. [He] is simply used. [He] has becomes a means to an end.[7]

Additional sentencing criteria

[25] In *R. v. S.C.C.,* my colleague Tufts J.P.C. listed a number of correlative factors I find useful in assessing the level of seriousness of cases involving child sexual abuse:

> (1) the degree of invasiveness or the nature of the assaults and the variety of the acts;
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> (2) the presence of other form of physical violence beyond the abuse itself;
>
> (3) the presence of threats or other psychological forms of manipulation;
>
> (4) the age of the victim;
>
> (5) other forms of vulnerability of the victim besides the parent/child relationship;
>
> (6) the number of incidents and the period of time over which the abuse occurred;
>
> (7) the impact on the victim;
>
> (8) the risk to re-offend.[8]

[26] Applying these factors to Mr. Stewart's crimes, I observe the following from the evidence put before me at the sentencing hearing:

- the sexual abuse of A.B., C.D., E.F. and G.H. would fall at the lower end of the range of severity, but amplified
- materially by offers of alcohol and tobacco as enticements, and by the fact that A.B., C.D., E.F. were vulnerable youth in care;

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[7]2009 NSPC 65 *aff'd.* 2011 NSCA 87.

[8]2004 NSPC 41 at para. 16.

- the abuse of I.J. was at the mid-to-high range of severity, given the earlier highly degrading sexual encounter and given what would inevitably have unfolded but for the prompt action of police; seriously aggravating as well was Mr. Stewart's use of a Schedule IV drug as bait, along with the alluring promise of tobacco and liquor;

- as I mentioned earlier in my judgment, I find the level of victim impact here to be high, particularly for I.J.;

- the victims were teenagers, and would likely have had a higher level of judgment and ability to take self-protective steps than if they had been very small children; however, they were drawn in by promises of alcohol, tobacco and drugs, sly means of overcoming resistance;

- one actuarial-based risk assessment instrument–the Static 2002R–classifies Mr. Stewart as a low-moderate risk for violent recidivism; however, the instrument which the psychologist assessor felt should be given greater weight–the Static 99R–placed the offender as a moderate-high risk; the Sex Offender Risk Appraisal Guide determined Mr. Stewart to be a moderate risk for future violent recidivism; the Psychopathy Checklist Revised classified him as a moderate-high risk for violence;[9]

- the Historical Clinical Risk 20 empirically based risk assessment instrument categorized Mr. Stewart as a moderate-high risk for violent recidivism, and a moderate-high risk for sexual recidivism;[10] anecdotal

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[9]Forensic Sexual Behaviour Pre-sentence Assessment, pp. 33-34.

[10]Ibid., p. 34.

evidence in the risk assessment report backs up the conclusion that Mr. Stewart continues to pose a risk for committing further acts of sexual predation against minors: he perceived his actions as having no harmful effects;[11]he felt that the boys were assenting "street kids";[12] when asked what he would say to his victims if he could, he replied, "Can't wait to see ya";[13] his actions were described by the psychologist assessor as "approach-explicit", meaning that the offender had a specific goal of sexually offending, and he undertook systematic planning toward that goal;[14]the offender's offering of alcohol and drugs as a lure had the double effect of seeking to overcome resistance of victims through intoxication and providing leverage against disclosure to parents or authorities due to fear of admitting to substance abuse;[15]

- psychological testing done by the psychologist assessor found Mr. Stewart to share traits with those who are floridly psychotic; he demonstrated entitlement thinking, and impressed as having narcissistic traits; he tried to game clinical penile plethysmograph testing by pretending to fall asleep; this invalidated the adult-sexual-violence portion of the PPG testing;[16]

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[11]Ibid., p. 31.

[12]Ibid., p. 30.

[13]Idem.

[14]Idem.

[15]Ibid., p. 29

[16]Ibid., pp. 18-21.

- on the child-sexual-violence portion of the PPG testing, Mr. Stewart produced moderate to strong sexual responses, revealing a deviant sexual preference for sexual assaults against passive and coerced male children; he also showed a preference for sexual assaults against against passive female children relative to his responding descriptions of consenting adult heterosexual sexual interactions;[17] this is validated in Mr. Stewart's own narrative, as he told the psychologist assessor that he enjoyed performing fellatio on the male minors with whom he hadsexual contact;[18]

[27] Mr. Steart's prior record includes multiple convictions for fraud-and-forgery related offences, indicative of traits of guile and cunning very much in evidence in his interaction with his victims.

[28] I recognize that the court must not be overwhelmed by the conclusions contained in the defence-requested forensic sexual behaviour pre-sentence assessment. It is just one of many sources of information useful in assessing Mr. Stewart's risk to the public. Furthermore, when I consider it in the context of Mr. Stewart's proven criminal conduct from July 2011 to January 2012, the assessment merely confirms what the court infers reasonably from that conduct: Mr. Stewart poses a real and substantial risk of sexually exploitative behaviour against minors.

Range of sentence

[29] It is important to distinguish between a range of penalty prescribed in a statute from the range of penalty appropriate in a specific case. A statute will fix an upper limit for a penalty–and now, more often, a lower limit as well. But the actual range of penalty to be considered by a court conducting a sentencing hearing will be governed by a constellation of factors, appositely described by Bateman J.A. in *R. v. Cromwell*:

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[17]Ibid., p. 21.

[18]Ibid., p. 14.

> Counsel for Ms. Cromwell says this joint submission is within the range. He broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender ("... sentences imposed upon similar offenders for similar offences committed in similar circumstances ..." per MacEachern, C.J.B.C. in *R. v. Mafi* (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.[19]

[30] Defence counsel argues that I ought to be guided, at least with respect to the luring offence, with the twelve-month-to-two-year range of sentence prescribed by the Ontario Court of Appeal in *R. v. Jarvis*.[20] Following from this, defence counsel asserts that I ought not to be guided by the more recently decided cases relied on by the provincial prosecutor, given the amendments to the *Code* included in the *Safe Streets and Communities Act* which, among other things, ramped up the sentencing provisions for internet luring to prescribe a minimum sentence of one year in jail when prosecuted by indictment.[21] This argument fails because of one key piece of legislative history. After the Ontario Court of Appeal rendered its in *Jarvis*, sub-s. 172.1(2) of the *Code* was amended by S.C. 2007, c. 20 to double the maximum potential penalty for indictable internet luring from five years to ten.[22] And so it is that I find the authorities provided by the prosecution most useful in determining an appropriate range of penalty for the luring offence as they reflect

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[19]2005 NSCA 13 at para. 26; see also *W. (E.M.), supra,* note 2 at para. 29, and *R. v. N. (A.)*, 2011 NSCA 21 at para. 34.

[20][2006] O.J. No. 3241 at para. 31.

[21]S.C. 2012, c. 1, sub-s. 22(2); in force 9 August 2012 in virtue of SI/2012-48.

[22]In force on Royal Assent 22 June 2007.

the need identified by Parliament to strengthen the level of deterrence imposed by sentencing courts in combatting internet luring of children by sexual predators.[23] I found the following cases most instructive in determining a proper range of sentence for the sub-s. 172.1(2) charge:

R. v. Porteous–a one-year term of imprisonment for luring; offender had no priors; the offender enticed a 12-year-old female with FASD to send him sexually explicit photographs which she had taken of herself; no in-person contact;[24]

R. v. Holland– an 18-month prison term for a 57-year-old male with no prior record who engaged in sexually-explicit internet luring; the notional victim was an undercover police officer posing as a 12-year-old female;[25]

R. v. Brown –10-month prison term for another case of luring involving an undercover police officer; positive antecedents; mental-health history; no evidence of prior record; Crown proceeded summarily;[26]

R. v. Porter–14-month term of imprisonment for luring and a one-month consecutive sentence for attempted sexual assault; 37-year-old male offender journeyed from Australia to try to sexually exploit a 14-year-old female he had groomed online; Crown proceeded summarily; sentencing judge reluctantly accepted a joint submission;[27]

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[23]The need to revise the Jarvis range was identified by the Ontario Court of Appeal, itself, in *R. v. Woodward*, 2011 ONCA 610 at para. 58.

[24]2011 ONCJ 305.

[25]2011 ONSC 1504.

[26]2010 ONCJ 664.

[27]2010 CanLII 22966 (NL PC).

R. v. Miller–bare federal term of two-years' imprisonment, followed by a three-year term of probation for a 44-year-old male offender with a prior record for offences against the person; a police-sting operation;[28]

R. v. Woodward– a particularly relevant case involving a 30-year-old male offender who lured a 12-year-old girl into a sexual encounter, including full intercourse, with fraudulent promises of a big sum of money; accused had numerous priors for frauds and thefts; a global sentence of 6.5 years was upheld, including an 18-month term for luring;

Restraint and totality

[31] In reaching a decision on sentence, I shall apply the principles of restraint and totality set out in paras. 718.2(c)-(e) of the Code, and in accordance with the guidance of *R. v.Adams*.[29] The court must not crush the prospect of rehabilitation. I must consider all available sanctions other than imprisonment reasonable in the circumstances. I am mindful that offenders ought not be deprived of their liberty should less restrictive sanctions be appropriate. Nevertheless, I am confident, given the seriousness of these offences, given Mr. Stewart's high degree of responsibility, given the need to denounce and deter particularly those offences that involve the sexual abuse of minors, and given the real and substantial risk Mr. Stewart poses to the protection and safety of the public–particularly those members of the public who are among the most vulnerable–that a mid-range penitentiary term is warranted here. I intend to take into account the principle of totality in following the "last-look" approach directed in *Adams*. Further, given that the aggravating facts in the luring charge arise necessarily from the facts implicated in the sexual-invitation charge involving I.J. as well as the trafficking charge, I feel that those charges should involve the imposition of concurrent sentences.

[32] Adams recommends that I consider initially what sentences would have been appropriate had each charge stood alone. I conclude as follows, noting that this preliminary tally is not the sentence of the court:

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[28]2010 ONCJ 368.

[29]2010 NSCA 42 at paras. 23-30.

- case number 2365624, a summary-offence charge of invitation to sexual touching under s. 152 of the Code; the complainant is A.B.; had that charge stood alone, the sentence would be 6-months' imprisonment;

- case number 2365625, a summary-offence charge of touching for a sexual purpose under s. 151; the complainant is C.D.;had that charge stood alone, the sentence would be 6-months' imprisonment;

- case number 2365626, a summary offence charge of s. 151; the complainant is E.F.; had that charge stood alone, the sentence would be 6-months' imprisonment;

- case number 2441275, and indictable offence under s. 151; the complainant is G.H.; had that charge stood alone, the sentence would be 9-months' imprisonment;

- case number 2418754, an indictable charge of breach of undertaking under sub-s. 145(3), tied to case number 2441275; had that charge stood alone, the sentence would be 9-months' imprisonment, recognizing that the breach involved the very type of conduct the undertaking was intended to prevent, that is, the sexual abuse of a minor;

- case number 2407391, an indictable offence of computer luring under para. 172.1(1)(b); the complainant is I.J.; had that charge stood alone, the court would have imposed a sentence of 5-years' imprisonment;

- case number 2407392, an indictable offence under s. 152; the complainant is I.J.; had that charge stood alone, the court would have imposed a sentence of two-years' imprisonment;

- case number 2407394, an indictable charge of breach of undertaking under sub-s. 145(3) of the *Code* tied in to case nos. 2407391, 2407392 and 2407396; had that charge stood alone, the court would have imposed a sentence of two-years' imprisonment;

- case number 2407396, an indictable charge of trafficking in a substance held out to be clonazepam, a schedule IV substance, contrary to para. 5(1) of the Controlled Drugs and Substances Act; had that case stood alone, the court would have imposed a sentence of two-year's imprisonment.

[33] Taking into account that totality principle and the need to consider concurrency, the final sentence of the court is as follows:

- case number 2365624, a summary-offence charge of invitation to sexual touching under s. 152 of the Code; the complainant is A.B.; 6-months' imprisonment; this is the starting point;

- case number 2365625, a summary-offence charge of touching for a sexual purpose under s. 151; the complainant is C.D.; 3-months' imprisonment, reflecting totality, to be served consecutively;

- case number 2365626, a summary offence charge of s. 151; the complainant is E.F.; 3-months' imprisonment, reflecting totality, to be served consecutively;

- case number 2441275, and indictable offence under s. 151; the complainant is G.H.; 6-months' imprisonment, reflecting totality, to be served consecutively;

- case number 2418754, an indictable charge of breach of undertaking under sub-s. 145(3), tied to case number 2441275; 6-months' imprisonment, reflecting totality, to be served consecutively;

- case number 2407391, an indictable offence of computer luring under para. 172.1(1)(b); the complainant is I.J.; three-years' imprisonment, reflecting totality, less one year credit for time served; full credit for time served is not appropriate in my view, as, applying the principles set out in *R. v. LeBlanc*,[30] it is important to note that Mr. Stewart had been admitted to bail, but wound

[30] 2011 NSCA 60 at para. 22.

up being bail denied and bail revoked because of his ongoing and serious criminal conduct in January 2012; accordingly, the sentence for this count is two-years' imprisonment to be served consecutively, and I order and direct that the warrant of committal and information 647778 be endorsed in accordance with the Truth in Sentencing Act to record that, but for the time spent on remand, the sentence for this count would have been a three-year consecutive sentence;

- case number 2407392, an indictable offence under s. 152; the complainant's I.J.; a two-year term of imprisonment, to be served concurrently;

- case number 2407394, an indictable charge of breach of undertaking under sub-s. 145(3) of the Code tied in to case nos. 2407391, 2407392 and 2407396; a one-year term of imprisonment, taking into account totality, but to be served consecutively given the need to generally deter this type of bail violation;

- case number 2407396, an indictable charge of trafficking in a substance held out to be clonazepam, a schedule IV substance, contrary to para. 5(1) of the Controlled Drugs and Substances Act; a two-year term of imprisonment, to be served concurrently .

[34] This results in a total penitentiary term, on a go-forward basis, of 5-years' imprisonment.

[35] Pursuant to s. 743.21, I order and direct that the warrant of committal be endorsed as follows: while in custody, Dennis Garry Stewart is to have no contact or communication, direct or indirect, with C.D., E.F., A.B., G.H., I.J. or K.L., or with any person under the age of 16 years.

[36] There will be a lifetime SOIRA order in accordance with sub-s. 490.013(2.1) of the *Code* applicable to case nos. 2365624-6, 2441275, 2407391-2, and a primary-designated-offence DNA collection order in relation to those same cases. There will be a lifetime prohibition order under s. 161 of the *Code* applicable to those same cases.

[37] In relation to case number 2407392, there will be a s. 109(2)(a) prohibition order commencing immediately to run for a term of 15 years, and a 109(2)(b) order commencing immediately to run for life. These can be combined in a single order document.

[38] Given the duration of this sentence and given Mr. Stewart's limited means, I find that the imposition of victim-surcharge amounts would work an undue hardship; there will be no victim surcharges.

ORDERS ACCORDINGLY

J.P.C.