PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v MacDermid*, 2022 NSPC 38

Date: 20221109
Docket: 8375168
Registry: Pictou

Between:

His Majesty the King

v

Brandon Morris MacDermid

SENTENCING DECISION

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Any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W Atwood
Heard:	2022: 30 August, 9 November in Pictou, Nova Scotia
Charge:	Paragraph 151(a) *Criminal Code of Canada*
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service Jonathan T Hughes for Brandon Morris MacDermid

Order restricting publication — sexual offences

486.4 (1) 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 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

(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).

By the Court:

Synopsis

[1] Brandon Morris MacDermid elected trial in this court and entered a guilty plea to an indictable count of sexual interference, contrary to § 151(a) of the *Criminal Code* (case 8375168).

[2] While there is some disagreement between counsel regarding what led up to the events that support the charge, it is undisputed that, on the evening of 3 August 2019 Mr. MacDermid—who was 20 years of age at the time—met the then-12-year-old victim, BC, at a residence in Pictou County. While in a bedroom together, Mr. MacDermid had his penis in the mouth of the victim and kept it there until he ejaculated. Mr. MacDermid admits being reckless about the age of the victim.

[3] The prosecution seeks a sentence in the range of 2.5-3 years in a penitentiary; defence counsel seeks a non-custodial sentence, and would have the court take into account the time Mr. MacDermid spent with his liberty constrained under the terms of a release order.

Sources of information

[4] The court has reviewed the following material:

- a transcript of proceedings of 7 December 2021 when Mr. MacDermid pleaded guilty and a statement of facts was put before the court;
- a presentence report dated 23 March 2022 [PSR];
- a Comprehensive Forensic Sexual Behaviour Presentence Assessment dated 7 March 2022 [the sexual-behaviour assessment];
- a sentencing brief from the prosecution dated 29 August 2022;
- a sentencing brief from defence counsel dated 30 August 2022; and
- a victim-impact statement prepared by BC.

Statutory provisions

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

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

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

[7] As the mandatory-minimum penalty has been adjudged unconstitutional in Nova Scotia, this case is eligible for the following sentencing outcomes: a period of imprisonment up to 14 years, to which might be added a fine (§ 734 of the

Code); or a period of probation, provided that any term of imposed imprisonment not exceed two years (¶ 731(1)(b)). It is eligible for a number of purely non-custodial sentences: a fine alone (s 734); a suspended sentence (¶ 731(1)(a)); a fine and probation (¶ 731(1)(b)). An indictable § 151(a) count is not eligible for a conditional sentence, given sub-¶ 742.1(c) and (e)(ii), nor is it eligible for a discharge, given § 730 of the *Code*; any constitutional uncertainty on the conditional-sentence-eligibility point was settled in *R v Sharma*, 2022 SCC 39.

[8] This is a primary-designated offence under the DNA-collection provisions of § 487.04 of the *Code*. It calls for a 20-year sex-offender-information-registration order under § 490.013(2)(b). It attracts a mandatory weapons-prohibition order under § 109(2). The court is required to consider the imposition of a § 161 prohibition order.

Core legal principles

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

- Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the *Code*— at ¶ 42.

- Sexual violence against children is especially wrongful because of their vulnerability—at ¶ 65.

- Sexual violence has a disproportionate impact on girls and young women—at ¶ 68.

- Sentencing judges must recognize the wrongfulness of sexual offences against children and the profound harm that they cause—at ¶ 50.

- The core interests protected by those provisions of the *Code* that criminalize the sexual abuse of children are personal autonomy, bodily integrity, sexual integrity, dignity, and equality—at ¶ 51.

- These core interests require courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological scars that may be more pervasive and permanent in their effect than any physical injury—at ¶ 56.

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

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

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

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

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

- Courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of an offence—at ¶ 84.

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

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

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

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

- Parliament's prioritization of denunciation and deterrence for sexual offences against children and vulnerable victims—implemented statutorily in § 718.01 and 718.04—places limits on the discretion of sentencing courts, such that it is no longer open to courts to elevate other sentencing objectives to an equal or higher priority—at ¶ 102, 116.

- Imposing proportionate sentences that respond to the gravity of sexual offences against children and the elevated moral responsibility of persons who commit them will frequently require substantial penalties; Parliament’s statutory amendments have strengthened that message. Mid-single digit

penitentiary terms for sexual offences against children ought to be seen as normal, and upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances—at ¶ 114.

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

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

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

    - likelihood of the person being sentenced to reoffend;
    - abuse of a position of trust or authority;
    - duration and frequency of the abuse;
    - age of the victim; and,
    - degree of physical interference—at ¶ 122-147.

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

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

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

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

Circumstances of the offence

[11] At the time the facts were put into the record before the court in accordance with § 723 of the *Code*, Mr. MacDermid acknowledged that he "received oral sex from the young woman who [was] under the age of 16"; it continued until Mr. MacDermid ejaculated.

[12] The effect on the victim was profound, as described in her victim-impact statement. She felt manipulated by Mr. MacDermid. Afterward, she found it hard to get out of bed, and experienced anger, sadness and social isolation. Her mental heath deteriorated, and she has received clinical antidepression treatment. This is evidence of elevated victim impact, as comprehended in ¶ 718.2(a)(iii.1) of the *Code*.

Circumstances of Mr. MacDermid

[13] Mr. MacDermid will turn 24 years of age tomorrow. He was 20 years old at the time of the offence.

[14] I shall refer to the sexual-behaviour assessment (n=page number) for biographical information on Mr. MacDermid and information on clinically assessed criminogenic factors. The sexual-behaviour assessment amplifies the details contained in the PSR and adds to them considerably.

[15] Mr. MacDermid lives at the former home of his paternal grandparents, on the same farm property where his parents reside. He has held general-labour jobs, and is currently in receipt of income assistance. Other than maintaining contact with long-term electronic-gaming friends, he is socially isolated (3).

[16] Mr. MacDermid's childhood was unstable and somewhat chaotic. He described experiencing physical abuse and lack of emotional support (9).

[17] He struggled in school and found it challenging; he was bullied; he was suspended on a number of occasions; he graduated in 2017, but did not achieve academic grade 12 (10-11, 36).

[18] He has a history of chronic mental-health diagnoses including:

- reactive-detachment disorder;
- ADHD;
- oppositional-defiant disorder;
- conduct disorder; and
- mood destabilization (24).

[19] Mr. MacDermid has been willing to seek clinical intervention; however, his willingness is reactive and he is motivated only when experiencing acute distress (24).

[20] The sexual-behaviour-assessment clinician was of the view that Mr. MacDermid's stress levels were high at the time of the assessment. Specifically:

> Persons with similar profiles do not tend to seek treatment voluntarily, as they resist psychological interpretation and resist taking personal responsibility for their problems. Test results are consistent with premature termination, and a tendency to blame the therapist for failures in progression. In Mr. MacDermid's case he has sought treatment himself over the years, but this has primarily been in response to a high level of distress. In the current interview Mr. MacDermid reported being appreciative of learning practical strategies, such as how to overcome his procrastination regarding household chores, but he continues to look externally rather than internally for solutions to failures in self-management (26).

[21] Mr. MacDermid was reluctant to discuss his sexual history with the clinician, which made it difficult for her to evaluate his sexual drive (16).

[22] Despite the absence of a complete narrative from Mr. MacDermid, the clinician was able to complete a penile-plethysmography [PPG] assessment which revealed that:

> Mr. MacDermid possesses sexual preferences for teen females (15 years and under), and when the underaged female is persuaded into the sexual contact (which mirrors Mr. MacDermid's index offense) rather than physically forced or coerced, his sexual preferences include elementary school aged girls (note that the index victim was aged 12 years). In comparison, his sexual arousal for consenting adult females was approximately half of that referenced above for underage categories, and did not reach minimum levels for interpretation (26-27).

[23] In his interaction with the sexual-behaviour-assessment clinician, Mr. MacDermid avoided accepting responsibility for the offence, and expressed the view that he was the target of a vindictive peer group. He asserted that his admission of guilt to police was false and, essentially, utilitarian:

> When queried, Mr MacDermid advised that he was untruthful with police, and that he simply "gave them what they wanted to hear so they let me go" because he was "scared" as a first time arrestee. Mr MacDermid further noted that he could have raised this explanation in his defense if he had fought the charges, but he considered the success of that to be "hit or miss" such that "I didn't want to chance it" and so he "took the plea deal". Mr MacDermid elaborated that he did not want to chance going to jail, and his understanding with the plea deal is that this will not occur. Mr MacDermid advised that he is willing to serve probation, and while he thinks being on the SOIRA is "disgusting", he can contend with it if it is only for 5-10 years; "I would take that over being killed in a penitentiary somewhere". Mr MacDermid further explained that "I did a plea deal just to get it over with", "I was willing to fight the trial, but when it comes down to it, my mental health wasn't strong enough to get up on the stand and be questioned by no good people."
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> Thus, while initially willing to take some responsibility for his actions when originally interviewed by police, at this stage Mr MacDermid has entrenched himself in complete denial of any wrongdoing. He is currently portraying himself as a victim of a vindictive peer group; "I hung out with the wrong people and I got burned for it . . . in the wrong place at the wrong time." "I was caught in the wrong place at the wrong time, but it doesn't mean I did anything".
>
> At times Mr MacDermid gave the impression that he felt remorseful and regretful for his actions, which would imply that he did something to be remorseful for; and that he characterized himself as having made a mistake in his actions in the index matters; "I made a mistake and I'm paying for it now" ... "I am me; mistakes don't define who a person is" "like I messed up and I can't do anything about it now, it's not like I can erase the past". When queried, however, Mr MacDermid claimed that "the mistake was that I admitted it to the cops". Mr MacDermid elaborated that until he made his disclosure "they really had nothing against me", "what threw me under the bus was my own statement".
>
> Overall, Mr MacDermid's choice in wording seems to reveal his awareness of his wrongdoing, but his desire to mitigate consequences to himself by denying it rather than admitting it. Mr MacDermid advised that "l don't want to consider myself a pervert because I'm far from it". It is likely that Mr MacDermid seeks to protect himself from further self-denigration, and from further rejection motivated by others seeing him as a pervert", by engaging in denial. This is a powerful motivator that will not be easily dissuaded (29-30).

[24] During sentencing submissions, this portion of the sexual-behaviour assessment was addressed by defence counsel; Mr. MacDermid affirmed the authenticity of his guilty plea.

[25] The sexual-behaviour-assessment clinician was of the opinion that Mr. MacDermid's entrenched denial of responsibility would operate as an impediment to working on additional criminogenic needs (31).

[26] Based on the results of risk-assessment instruments, the clinician was of the opinion that Mr. MacDermid's risk for recidivism (including violent, non-sexual recidivism) as high, and his risk for any reoffending as high. At the most conservative estimate, his risk for sexual reoffending is in the above-average-to-well-above-average range (35). Further:

> Actuarial risk estimation places Mr MacDermid in the higher risk range for again being before the courts for another violent or sexual offense, relative to others who have been adjudicated for similar matters. He scores high on dynamic risk indicators, which shows that he has a number of areas of criminogenic need that he would have to manage more effectively before he could achieve successful management of his higher risk. This is unlikely to be achieved by attending the FSBP treatment program in Truro, largely due to Mr MacDermid possessing more risk than the group is designed to address, and because he is entrenched in his denial (the group for those denying their sexual offenses being located in Dartmouth, some distance from Mr. MacDermid's home) (37).

[27] I have presided over appearances by Mr. MacDermid on another sexual-offence case set for trial in 2023. Mr. MacDermid is presumed innocent of that charge, and it has no bearing on the outcome of this case.

Sentencing outcomes in child-sexual-abuse cases

[28] It has been suggested that "the overarching factor in sentencing is not parity but proportionality in each individual case"—*R v AMB*, 2022 NSSC 262 at ¶ 29

[*AMB*]. At first glance, there may seem to be some ambiguity in this statement, particularly when parity is supposed to operate as an expression of proportionality and to give meaning to proportionality—*Friesen* at ¶ 32-33. Perhaps the point being made in *AMB* was that previously decided cases will have reduced precedential value for parity purposes after an apex court or intermediate appellate court has decided to set a new sentencing direction, as comprehended in *Friesen* at ¶ 35. Additionally, parity does not preclude disparity when warranted by the circumstances, because of the need for proportionality—*R v LM*, 2008 SCC 31 at ¶ 36.

[29] On that subject, I am unable agree with the proposition made in the brief for the prosecution that cases decided prior to *Friesen* are of little assistance in determining parity. The prosecution cites *R v CMS*, 2022 NSCC 166 at ¶ 64 [*CMS*] in support of that argument. However, that was not the point made by the sentencing judge in *CMS*. Rather, the judge found that certain specific pre-*Friesen* cases cited as parity authorities by defence counsel were of no assistance as they were adjudged as being inconsistent with the directions and principles laid out in *Friesen*. Not even *Friesen* went so far as to direct a wholesale exclusion of legacy sentencing precedents from parity calculations; rather, the Court urged caution before relying on precedents that might be

dated—*Friesen* at ¶ 110. Caution was precisely the approach of the sentencing judge in *CMS*. Moreover, in *R v M(CJP)*, 2022 NSSC 315 at ¶ 21, the sentencing judge relied extensively on pre-*Friesen* authorities in finding support for the sentence that was imposed in that case; the decision by the judge to do so was reasonable, as the cases which he cited were in good agreement with *Friesen* values. There are plenty of pre-*Friesen* cases that had a good, early grasp of denunciation-and-deterrence primacy in child-sexual-abuse cases and that gave effect to it; these cases can continue to be cited as valid parity comparators.

[30] Having said that, my focus will be on more recent ones.

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

Citation	Synopsis	Sentence imposed
R v CMS, 2022 NSSC 166 [*CMS*]	Conviction for § 151 offence following jury trial; four instances of sexual touching over three months, including one instance of vaginal touching over clothing, and one under clothing. A trust relationship of	24-month penitentiary term, 3-year probation order, ancillary orders.

	short duration. Convicted following trial. No criminal record. CMS was 28 years old at the time of the offence; the complainant was under 14 years of age. Favorable PSR and good prospects for rehabilitation.	
R v Wood, 2021 NSSC 253 [*Wood*]	Accused pleaded guilty to charges of 151, 163.1(2) (making child pornography), and 92(1). Mr. Wood was a 24-year-old offender who met the 15-year-old victim through Snapchat. They agreed to meet on two separate occasions. Mr. Wood picked up the victim in his car and brought her to his place where he supplied her with alcohol and drugs. Vaginal penetration occurred on multiple occasions during each of the two visits. He took videos and photos. He had a limited criminal record but with some convictions for violence.	3.5 years for § 151; 1-year consecutive sentence for § 163.1(2).
R v TKB, 2022 NSSC 150 [*TKB*]	Conviction recorded for § 151 following judge alone trial; § 271 count stayed; 2 instances of snapping victim's bra, an	12-month term of imprisonment, probation, and ancillary orders.

	incident of pinching her buttocks over the clothes and then trying to hug her and pull away a blanket she was using to cover herself; an incident of pinning her wrists to a wall and licking her face. Victim was 14-15 years old. Accused 56 years old at time of sentencing. No prior criminal record.	
R v Storey, 2021 ONSC 1760 [*Storey*]	21-year-old accused with a significant intellectual disability had a brief sexual relationship with a 13-year-old female. Good prosects for rehabilitation and a long history of willing participation in therapeutic counselling.	45-month sentence for a count of § 151; an additional 15 months imposed for counts of §266, 163.1(4) (child pornography), and 171.1 (supplying sexually explicit material to a minor); these sentences were fixed after granting the accused a 12-month credit for pre-trial custody and for four years of house arrest.
R v M(CJP), 2022 NSSC 315 [*M(CJP)*]	Accused convicted of single count of sexual assault following judge-alone trial, reported at 2022 NSSC 253. While lying in a bed with the victim (who was impaired by beverage alcohol), the accused engaged in a single act of non-consensual sexual intercourse. The accused,	The court accepted a joint recommendation for a two-year penitentiary term, a 2-year term of probation, and ancillary orders.

	a young adult male, had no record, was engaged, enjoyed good health, and was active in his community. Good prospects for rehabilitation.	

Application of Friesen principles to this case

[32] The court must consider the following criteria which *Friesen* determined were of signal importance in determining a fit sentence.

- Likelihood of reoffending: the sexual-behaviour assessment classifies Mr. MacDermid's risk for reoffending sexually as above average to well above average, which calls for emphasis on the sentencing objective of separating the person to be sentenced from society—*Friesen* at ¶ 123.

- Abuse of a position of trust or authority: while the existence of a position of trust between Mr. MacDermid and BC was not established to the beyond-a-reasonable-doubt standard mandated in ¶ 724(3)(e) of the *Code*, there was an 8-year age difference between Mr. MacDermid and BC, which is an aggravating factor—see *R v Fisher*, 2020 NSSC 325 at ¶ 93. A significant age difference creates victim vulnerability, which requires the court to give primary consideration to denunciation and deterrence—§ 718.04.

- Duration and frequency: the sexual abuse of BC by Mr. MacDermid involved one act. The court must remain mindful of the binding guidance in *Friesen* at ¶ 114 that a single occurrence of child sexual abuse is a serious offence.

- Age of the victim: the victim was only 12 years of age at the time; the impact upon her was profound and will be enduring; the power imbalance between children and adults is more pronounced the younger the child—*Friesen* at ¶ 135. The age of the victim is aggravating statutorily under ¶ 718.2(a)(ii.1).

- Degree of physical interference: Mr. MacDermid kept his penis in the mouth of the victim until he ejaculated; this was a significant violation of the sexual integrity and human dignity of a 12-year-old child, for which Mr MacDermid was solely responsible.

[33] Mr. MacDermid's young age and guilty plea are substantial mitigating factors. I have considered also his mental-health history. A mental disability may be a mitigating factor if it renders a person more prone to risk-taking activity—*Friesen* at ¶ 91, citing *R v Hood*, 2018 NSCA 18 at ¶ 180. However, it is not clear from the sexual-behaviour assessment that Mr. MacDermid's diagnoses contributed to his choice to violate BC; they may be at work in his

denial of responsibility, but that does not seem to have a significant bearing on culpability.

[34] In evaluating the seriousness of the offence, Mr. MacDermid's degree of responsibility, weighing the identified mitigating and aggravating factors, and comparing the circumstances of this case to recently decided cases, I determine the range of sentence in this case to be two to three years in a penitentiary. Appellate guidance directs sentencing courts to accord leniency for younger adults with no prior record in order to facilitate rehabilitation: *R v Tamoikin*, 2020 NSCA 43 at ¶ 84 [*Tamoikin*]. Further, I am mindful that the sexual-behaviour assessment (37) offers a precautionary opinion about the limited specific-deterrent effect of a prison sentence for Mr. MacDermid.

[35] However, grave crimes require substantial emphasis on deterrence even if rehabilitation possibilities are thus not improved but reduced: *Tamaoikin* at ¶ 84, citing with approval *R v Hingley* (1977), 19 NSR (2d) 541 at ¶ 12; further, § 718.01 and 718.04 require the court to give primary consideration to denunciation and deterrence, and these provisions have removed the discretion of the court to assign first priority to rehabilitation.

[36] In my view, a fit sentence would ordinarily be a two-year term of penitentiary custody, followed by a three-year term of probation. A two-year term is substantially lesser than the sentences in *Wood* and *Storey*, which is proper given that the frequency of abuse and degree of physical interference in this case is lesser than in those cases. It is in line with *CMS*, a case which, although it involved the exploitation of a trust relationship, also involved a lesser degree of physical interference. It is in line with *M(CJP)*, which I consider to be a reasonable comparator: although the victim in that case was an adult (and so typically leading to a lesser sentence than in a child-sexual-abuse case), the accused exploited the victim's alcohol impairment, and the level of physical interference was greater. A two-year term is greater than the sentence imposed in *TKB*, which is supportable as the physical interference proven in this case is significantly greater than in that one.

Credit for stringent terms of bail

[37] Before determining a final sentence, the court must decide whether to reduce the sentence in recognition of Mr. MacDermid having been subject to stringent terms of bail. In *R v Gibbons*, 2018 NSSC 202 at ¶ 65-73 and 75—a case cited by defence counsel on this point—the person being sentenced had spent 18 months on house arrest; the sentencing judge received documentary evidence

and heard testimony from Mr. Gibbons, his friends and treatment providers, all descriptive of the actual loss-of-liberty impact arising from house arrest. Based on that evidence, the judge reduced the intended sentence by 9 months, but rejected the defence proposition that a *Carvery*-level 1.5:1 credit ought to be given.

[38] In Mr. MacDermid's case, no evidence analogous to what was heard in *Gibbons* was presented to the court.

[39] In fact, the risk-assessment report would appear to suggest that the bail restrictions imposed upon Mr. MacDermid have not resulted in significant changes to his typically housebound, electronic-gaming lifestyle and social circle (sexual-behaviour assessment 13).

[40] Mr. MacDermid has continued to socialize with friends, and once spent an evening with a 14-year-old female; he believed, apparently mistakenly, that this visitor was "17 turning 18" (sexual-behaviour assessment 6). This was a risky liaison, as Mr. MacDermid's release order prohibited him from having unsupervised contact with persons under 16 years of age.

[41] I would observe as well that Mr. MacDermid's initial terms of release on this charge—a § 498 peace-officer undertaking, order 2207541—carried few

restrictions. It was only after Mr. MacDermid incurred additional charges that he ended up subject to enhanced restrictions in release order 2271922. Further, the order was varied on 18 February 2022 to add two further exceptions to the terms of house arrest, so that the order has not been one of unrelenting restriction.

[42] I am not satisfied that there is an evidentiary basis that would support a reduction of sentence, even though the release order has been in effect for 2 years and 3—*R v Knockwood*, 2009 NSCA 98 at ¶ 36 [*Knockwood*]. Having said that, the court has, in a limited way, factored it into the mix in situating the sentence at the lower end of the range—*Knockwood* at ¶ 29 and 33; *R v Kennedy*, 2021 NSSC 322 at ¶ 26.

Sentence

[43] Accordingly, the following is the final sentence for case 8375168:

- A term of two-years' imprisonment in a federal penitentiary;
- A three-year term of probation with conditions set out in a checklist which I have provided to the clerk of the court and reviewed with counsel;
- A primary-designated offence DNA-collection order;

- An order pursuant to § 109 of the *Criminal Code* to run for the required 10-year-plus-term-of-imprisonment/lifetime terms;
- A *Sexual Offender Information Registration Act* (SOIRA) order for 20 years;
- A § 743.21 non-communication order prohibiting contact with BC to be endorsed on the warrant of committal;
- A 5-year § 161 prohibition order to be drafted by the prosecution.

[44] Given the duration of the sentence and Mr .MacDermid's limited means, the victim-surcharge amount is waived.

[45] All reports may be release to federal and provincial corrections authorities.

[46] In concluding the judgment of the court, I feel obligated to make the following observation. In oral argument in *R v Parranto* online: https://scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=39227&id=2021/2021-05-18--39227&date=2021-05-18 time marker 11:12 (decision reported at 2021 SCC 46), a member of the panel, who had concurred in the judgment in *Friesen*, offered the following observation on what the Court had undertaken to accomplish in *Friesen*:

> [S]ometimes an appellate court can set a new direction, can take a lead, and in fact, we did in *Friesen*. Having briefed the cases, we found them too low and we wanted to kick the numbers upstairs a little bit.

[47] I recognize that, in the impromptu give and take of oral argument, a certain level of informality can creep into proceedings. Nevertheless, things said in an apex court matter. In *Friesen*, the Court issued binding guidance that is destined to affect the outcomes in many cases for many years. It is important that we not lose sight of the fact that we are not dealing with mere cardinal numbers, but with the consequences of depriving persons being sentenced of their liberty—removing them coercively from their homes, jobs, families, and communities—sometimes for very lengthy periods of time. Precisely because those outcomes can be life-altering, it is important that the sentencing project continue to be taken seriously.

JPC