PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacDonald*, 2023 NSPC 21

Date: 20230509
Docket: 8450075, 8450076, 8455935, 8455936, 8455939
Registry: Pictou

Between:

His Majesty the King

v

Justin Stanley MacDonald

TRIAL DECISION

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Any information that will identify the complainants shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W Atwood
Heard:	2023: 21, 22, 23, 28, 29, 31 March; 9 May in Pictou, Nova Scotia
Charge:	Sections 151, 271, and 733.1 of the *Criminal Code of Canada*
Counsel:	Peter Dostal and Josie McKinney for the Nova Scotia Public Prosecution Service Pavel Boubnov for Justin Stanley MacDonald

Order restricting publication — sexual offences

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of the *Criminal Code*, information that may identify the persons described in this decision as the complainants may not be published, broadcast, or transmitted in any manner.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

Reasons for judgment:

Synopsis

[1] The court is proceeding to adjudication following a trial.

[2] Justin Stanley MacDonald is facing charges under § 151, 271, and 733.1 of the *Criminal Code*. The prosecution proceeded by indictment.

[3] Mr MacDonald elected trial in this Court and pleaded not guilty.

[4] The counts are set out in two informations (806310 and 807763) which are being tried jointly by consent of counsel in accordance with *R v Clunas,* [1992] 1 SCR 595 at ¶ 33.

[5] The prosecution alleges that Mr MacDonald committed the following offences:

- touching EH for a sexual purpose (§ 151, information 806310, case 8450076);
- sexually assaulting EH (§ 271, information 806310, case 8450075);
- touching KB for a sexual purpose (§ 151, information 807763, case 8455935);
- sexually assaulting KB (§ 271, information 807763, case 8455936);

- breaching a keep-the-peace condition of a probation order that was made on 1 February 2018; the alleged breach is the commission of the preceding offences (§ 733.1, information 807763, case 8455939).

[6] The prosecution alleges that the acts occurred between 1 January 2020 and 10 July 2020 in New Glasgow.

[7] The external elements of the charges before the court are not controversial. This is because Mr MacDonald admitted in his testimony to having had intentional sexual contact (including vaginal intercourse) with EH. He acknowledged that he had intimate physical contact with KB. Both KB and EH were under 16 years of age at the time.

[8] Mr MacDonald argues that his conduct should not be criminalized as he believed that EH and KB were 17 or 18 years old when the sexual activity took place. Further, he asserts that his conduct with KB was merely "flirting" without a sexual purpose.

[9] The prosecution theory is that Mr MacDonald's mistake-of-age defence is unsupportable, as the evidence proves beyond a reasonable doubt that he failed to take all reasonable steps to ascertain the real ages of EH and KB. Further, the prosecution alleges that exhibited photographs taken by Mr MacDonald on

his smartphone show him engaged in sexualized activity with KB, and demonstrate an unmistakable sexual purpose. Additionally, the prosecution relies on Mr MacDonald's testimonial admissions that he knew EH and KB looked young, did not believe what they had told him about their ages, and suspected they were underage: fixed with this knowledge and suspicion, Mr MacDonald was wantonly reckless in going ahead and having sexual contact with EH and KB. The prosecution contends that this is sufficient to prove the fault elements of the § 151 and § 271 offences beyond a reasonable doubt.

[10] There is no controversy that Mr MacDonald knew that he was subject to the terms of a probation order over the period of time that he was in close physical contact with KB and EH. If guilty of the § 151 and § 271 offences, he would necessarily have been in breach of the keep-the-peace condition of that order.

[11] For the following reasons, I find Mr MacDonald guilty as charged.

Relevant and material evidence/governing admissibility law

Police and DCS witnesses

[12] The court heard from several police witnesses who conducted street surveillance and photographed Mr MacDonald's movements when he was

accompanied by KB (Exhibit 12), seized exhibits from Mr MacDonald's apartment at the time of his arrest, and extracted data from his smartphone (Exhibits 10-11). Investigators took photographs of Mr MacDonald's apartment and of items they seized during a warranted search (Exhibits 1 and 8); they video recorded a walkthrough of the apartment (Exhibit 2); they photographed tattoos on Mr MacDonald's body (Exhibits 6-7). It is not necessary to review the evidence of these officers in detail, as Mr MacDonald's testimony renders it mostly uncontroversial.

[13] The court heard also from two staff of the Department of Community Services who were involved in the care of EH and KB; they verified the dates of birth of EH and KB, making each one 15 years old when in they had physical contact with Mr MacDonald.

Testimony of EH

[14] The key prosecution evidence in the trial of the charges involving EH came from EH. EH's evidence did not intersect substantially with the charges involving KB. The prosecution did not seek count-to-count reception of similar-fact evidence. Accordingly, the court must treat each count as a separate indictment, notwithstanding the joinder of the informations: *R v RTH*, 2007 NSCA 18 at ¶ 93.

[15] EH testified to her date of birth; she was 15 years old during the time she was sexually active with Mr MacDonald.

[16] EH met Mr MacDonald sometime in early 2020; she was living in a group home in Pictou County; she described the home as providing shelter and care for vulnerable young persons, all female, between 14-18 years of age.

[17] EH was introduced to Mr MacDonald through a mutual friend, RMH. Mr MacDonald was living with a roommate, John Bonnar, at an apartment in New Glasgow.

[18] At first, EH was going with Mr Bonnar. Soon after, she and Mr MacDonald became close, and they began engaging in sexual activity.

[19] EH stated that her sexual relationship with Mr MacDonald lasted about two weeks; it ended when she was admitted to secure care at the Wood Street Centre in Truro. After EH was discharged from Wood Street and returned to Pictou County, she discovered that Mr MacDonald had begun a relationship with someone else; theirs was over.

[20] EH described spending a lot of time at Mr MacDonald's apartment over the two weeks that they were sexually active. There was a great deal of alcohol and controlled-substance use (EH and others were consuming "meth, cocaine, molly

and ice"); however, EH was clear that she was never offered drugs in exchange for sex. She characterized her sexual relationship with Mr MacDonald as "consensual," but had come to recognize it as exploitive because of their age difference.

[21] EH believed that she had had vaginal intercourse with Mr MacDonald "two, three, four times max"; she could not remember if Mr MacDonald had ever used a condom, but she did not think so. She identified Exhibits 3-5 as Snapchat images of her in poses of physical intimacy with Mr MacDonald, taken using EH's smartphone which she had provided to police following Mr MacDonald's arrest. These images were authenticated as genuine, in part through the evidence of EH, but mostly through the evidence of Mr MacDonald, himself. I will discuss the law pertaining to authentication later on, in reviewing data extracted from Mr MacDonald's smartphone.

[22] EH testified initially on direct examination that she could not remember discussing her age with Mr MacDonald. The prosecutor sought to refresh EH's memory by referring her to a statement she had given to police around the time Mr MacDonald had been charged. After reviewing her statement, EH said that she was able to recall that she had told Mr MacDonald she was 15 years old.

[23] It is important to observe that evidence given by a witness prior to a memory-refreshing exercise does not become nullified once the refreshing piece has concluded. If a testimonial account given by a witness ends up changing after the memory of the witness has been seemingly refreshed through an in-court review of an earlier statement, that change becomes a credibility issue which the court must address if the testimony touches on a material point. Further, a refreshed memory is not necessarily an improved memory. A great unknown in many of these memory-refreshing forays is the accuracy of the earlier statement used as the memory aid. There were no questions asked about that point.

[24] On cross-examination, defence counsel confronted EH with the assertion that she had lied about her age to Mr MacDonald and had told him she was 18. EH denied it. Defence counsel asked EH if she remembered having a "video conversation" with a Tara Hughes (a person called later as a defence witness). EH replied: "I don't think it happened, but I don't recall meeting the woman in general, but if you've got evidence, I'd like to see it." Defence counsel did not develop this line of cross-examination any further.

[25] Still on cross, EH admitted telling Mr MacDonald's roommate, Mr Bonnar, that she was 18 years old; however, she was insistent that she had provided her true age to Mr MacDonald.

Exhibits revealing contact with KB and best-evidence/authenticity/authorship criteria

[26] KB did not testify. She was present at the justice centre at the start of the trial; however, she left before giving her evidence. In place of her testimony, the prosecution presented the court with a series of chat logs (Exhibit 10) and copies of digital photographs (Exhibit 13) which had been extracted by Cpl Byron Mercer from an Alcatel smartphone seized by police when Mr MacDonald was arrested; defence counsel admitted, without the need for a full qualificational *voir dire*, Cpl Mercer's expertise (the prosecution tendered his *cv* as Exhibit 12) in the extraction and interpretation of electronic data. Admissions regarding expertise, while efficient, do not eliminate the court's gatekeeping function to guard against the reception of extravagant, unsupported, or immaterial opinions: *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at ¶ 16. However, the risk of confusion arising from the chat logs and the digital photographs is minimal, as the exhibits were sufficiently authenticated through the testimony of Mr MacDonald,

himself. The process of authentication is comprehended in § 31.1 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*]; see also *R v CB*, 2019 ONCA 380 [*CB*]: in this case, the exhibits are acknowledged by both counsel to be accurate copies of screen shots representing electronic data that had been stored on Mr MacDonald's phone when he and KB were exchanging messages and taking photographs of themselves; the chat logs and photographs are electronic documents as defined in § 31.8 of the *CEA* as a "display, printout or other output of . . . data." Accordingly, there is evidence capable of supporting a finding that the chat logs and photographs are that which they are purported to be: *R v Farouk*, 2019 ONCA 662 at ¶ 60. Mr MacDonald admitted in his testimony—after some initial hesitancy—that the smartphone was his, that the chat logs were an accurate record of messages he exchanged with KB, and that the copies of the photos depicted accurately the physical encounters he had had with KB when they were together (mostly in his apartment). *CB* described the authenticity threshold as "modest"—at ¶ 51. In this case, given Mr MacDonald's evidence, that threshold was amply surpassed. Further, although an electronic record can be authenticated and admitted into evidence without being found to be "genuine"—*R v Martin*, 2021 NLCA 1 at 49—Exhibits 10 and 13 are, in fact, genuine representations of Mr MacDonald's chats with EH

and his physical encounters with her because he admits that they are so. Unlike *R v Aslami*, 2021 ONCA 249 or *R v Andalib-Goortani*, 2014 ONSC 4690, there is no issue that the chats or the photos have been altered or are fakes. Mr MacDonald's acknowledgments in court that he was the person exchanging the logged text messages with KB, and that the logs were accurate, satisfy the best-evidence criteria in § 31.2 of the *CEA*, the integrity criteria in § 31.3, and are satisfactory proof of authorship.

[27] The chat logs (Exhibit 10) are a record of mostly anodyne exchanges between Mr MacDonald (username bunny6hopper6M!kk!eM0u$e) and KB (username [redacted]). I believe that the court is able to receive them as probative of the fact that KB and Mr MacDonald had emotional feelings for each other, and felt comfortable sharing private personal details.

[28] However, the logs are not probative of Mr MacDonald having had a sexual purpose in his contact with KB; there is no sexualized content that I can see, and nothing from which a secure inference of sexual purpose might be drawn.

[29] The digital photos (Exhibit 13) are different; they depict Mr MacDonald and KB in close and intimate contact. They appear to have been taken by Mr

MacDonald himself while holding his smartphone and by KB with her smartphone.

[30] Additionally, police witnesses who were surveilling Mr MacDonald prior to his arrest on 11 June 2020 observed him walking with KB; an officer photographed Mr MacDonald and KB holding hands (Exhibit 12). Mr MacDonald acknowledged that these photographs were accurate depictions of him walking with KB on the date of the surveillance.

[31] The data extracted from Mr MacDonald's smartphone are not relevant to the charges involving EH.

Probation order

[32] The prosecution tendered an exemplified copy of Mr MacDonald's probation order (Exhibit 14). The order was in effect during the time Mr MacDonald was sexually active with EH and KB.

Testimony of Mr MacDonald

[33] Mr MacDonald chose to testify about all of the § 151 and § 271 counts.

[34] I mentioned earlier that each count before the court must be assessed as a separate indictment. However, the law is clear that credibility findings may

apply across all counts, provided that the court explain its findings: *R v PEC*, 2005 SCC 19 at ¶ 1; *R v RAG*, 2008 ONCA 829 at ¶ 13; *R v Wright*, 2019 BCCA 234 at ¶ 57-58. In this case, the evidence given by Mr MacDonald was offered expansively to cover all counts; applying a credibility finding regarding Mr MacDonald's testimony to all counts before the court will accord precisely with what Mr MacDonald has asked the court to do.

[35] During direct examination, Mr MacDonald stated that he was 22 years old back in the winter and spring of 2020; he admitted to having sexual intercourse with EH, pretty much as she had described it; the only point of divergence in their evidence had to do with what EH had told Mr MacDonald about her age. Mr MacDonald said that EH had told him she was 18 years old; he stated EH gave the same age in a conversation with his close friend, Tara Hughes.

[36] On cross-examination, Mr MacDonald agreed that EH looked young, and he did not believe her when she told him she was 18 years old. When asked if he had suspected EH and KB were underage, Mr MacDonald replied, "yeah." He agreed that he had not asked either complainant for a proof-of-age ID.

[37] I am cautious not to give outsized effect to any one answer given by Mr MacDonald on cross-examination. There is a tendency to regard solitary,

damaging admissions by accused persons, blurted out in cross, as proof-of-guilt, gotcha moments. The reality is that cross-examination projects a powerful influence for suggestibility; consequently, it is important for the court to examine the entirety of Mr MacDonald's evidence when analyzing its legal effect.

[38] As reviewed previously, Mr MacDonald admitted that the chat logs (Exhibit 10) captured accurately the text messages he had exchanged with KB between 2 April 2020 and 1 June 2020; he acknowledged that the digital photographs (Exhibit 13) were selfies he had taken with his smartphone showing him in a number of intimate embraces with KB.

Testimony of Tara Hughes

[39] Tara Hughes was a defence witness who described herself on direct examination as having fulfilled a parental role in Mr MacDonald's life for many years; Mr MacDonald had endured a number of adverse childhood experiences, and he had no support from his biological parents. Ms Hughes has provided Mr MacDonald with food and shelter when needed, but has helped Mr MacDonald with precaution, as she is aware of his struggles with controlled substances.

[40] Ms Hughes was asked about a conversation she once had with EH, apparently in the presence of Mr MacDonald, when Ms Hughes asked EH her age. According to Ms Hughes, EH gave her age as 18 and seemed quite disturbed about being asked.

[41] On cross-examination, Ms Hughes acknowledged that she had not made notes of the conversation, but said that she had a clear and certain memory of EH saying she was 18 years old.

[42] Ms Hughes' memories of other aspects of that conversation and of other contemporaneous events were less clear.

[43] An objection might have been raised by the prosecution whether EH was not confronted on cross-examination with specific details of her alleged conversation with Ms Hughes. After all, EH had told defence counsel during cross examination: "I don't recall meeting [Tara Hughes] in general, but if you've got evidence, I'd like to see it." EH did not see it, as defence counsel did not challenge her with Ms Hughes' evidence. When a party seeks to contradict an opponent's witness with evidence of a prior-inconsistent statement, that party should present the witness with the earlier statement and give the witness an opportunity to explain it. This was the principle laid down in *Browne v. Dunn* (1893), 6 R. 67

(HL); it is a principle implicit in trial fairness, and codified in § 11 of the *Canada Evidence Act*. This procedural guarantee reduces the need for rebuttal evidence or other delays, and help trials move along smoothly. However, no objection was raised by the prosecution in this case, and it was not necessary for the court to deal with the issue.

Age of consent and the mistake-of-age defence—honest belief/all reasonable steps

[44] In 2008, Parliament amended the *Code* to raise the age of consent for sexual activity to 16 years; it had been 14: *Tackling Violent Crime Act*, SC 2008, c 6, in force 1 May 2008 in virtue of SI/2008-34. Sexual activity with any person under 16 years of age is criminalized through the operation of § 150.1 of the *Code*, and the existence of factual consent is not defensible, subject to a number of close-in-age exemptions which are not live in this case.

[45] In cases when the close-in-age exemptions do not apply, an accused person may raise a defence of mistake of age. However, § 150.1(4) states that this defence is available only when the accused person took all reasonable steps to ascertain the age of the complainant.

[46] *R v George*, 2017 SCC 38, rev'g 2016 SKCA 155 [*George*] describes the practical application of the defence:

- The defence of mistake of age seeks to negative proof of criminal intent—*George* at ¶ 7.

- Through statutory intervention, Parliament has imported an objective element into the fault analysis to enhance protections for youth in cases involving sexual abuse—*George* at ¶ 8.

- To convict an accused person who demonstrates the existence of an air of reality to the mistake-of-age defence, the prosecution must prove, beyond a reasonable doubt, either that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take "all reasonable steps" to ascertain the complainant's age (the objective element)—*George* at ¶ 8.

- Determining what raises a reasonable doubt with respect to the objective element is a highly contextual, fact-specific exercise. While it would be an error to insist that a reasonable person ask a sexual participant's age in every case, it would likewise be an error to assert that one need only ever ask a participant's age, given the commonly recognized motivation for young people to misrepresent themselves as being older—*George* at ¶ 9.

- The more reasonable an accused's perception of the complainant's age, the fewer steps reasonably required of them—*George* at ¶ 9.

[47] Cases that followed *George* built on the mistake-of-age analysis.

[48] Reasonable steps are steps that a reasonable person would take, in the same circumstances known to the accused at the time, to ascertain a complainant's age. The reasonable-steps requirement includes both objective and subjective elements. The steps, viewed objectively, must be reasonable; the reasonableness of those steps must be asserted in the circumstances known to the accused—*R v Morrison*, 2019 SCC 15 at ¶ 105.

[49] The number of steps required will be context specific—and dynamic. Initial certainty might give way due to later events; further, it is not enough for a person to have taken "some reasonable steps"; rather, taking "all reasonable steps" is the requirement—*R v WG*, 2021 ONCA 578 at ¶ 60-62 [*WG*].

[50] An air of reality to a defence can be said to exist when there is evidence in the trial record upon which a properly instructed jury, acting reasonably, and assessing the evidence in a manner most favourable to the accused, could acquit: *R v Cinous*, 2002 SCC 29 at ¶ 49, 98 and 221.

Age of consent and the mistake-of-age defence—air of reality

[51] A court should consider a defence only when there is an air of reality to it: *R v GF*, 2021 SCC 20, at ¶ 97, rev'g 2019 ONCA 493.

[52] Determining whether an air of reality to a mistake-of-age defence exists in a specific case requires an assessment of all of the circumstances of the case; however, it must arise from more than the mere assertion of the accused person: *R v Bulmer*, [1987] SCJ No 28 at ¶ 12, rev'g [1983] BCJ No 1403 (CA). Evidence coming from someone or something other than the accused person will improve the chances of an air of reality being found to exist: *R v Park*, [1995] SCJ No 57 at ¶ 20, rev'g [1993] AJ No 735 (CA).

[53] Even when an air of reality does not exist to support a mistake-of-age defence, or even when the prosecution has negated the defence by proving beyond a reasonable doubt that the accused did not fulfil the all-reasonable-steps requirement, a court must avoid a reasoning path that would lead to an automatic conviction. This is because the core mental element—that the accused believed that the complainant was under 16 years of age—must still be proven by the prosecution beyond a reasonable doubt.

[54] *R v Carbone*, 2020 ONCA 394 at ¶ 122-127 and *WG* at ¶ 68-70 offer a useful analysis of the mental-element issue. To repeat, even when a mistake-of-age defence has been negatived beyond a reasonable doubt, a finding of guilt does not follow automatically. The prosecution must still prove beyond a reasonable doubt the mental element of the offence: intentional sexual activity

with a person known to the accused as being under 16 years of age. Reckless indifference to the age of the complainant may suffice. An accused person may have appreciated that there was a risk that the complainant was under 16 but decided to go ahead anyway despite that risk—*WG* at ¶ 68. An accused person who chooses to proceed with the activity that § 151 prohibits—sexual activity with young persons—after having adverted to the possibility that the complainant was underage, will inevitably be found to have been reckless with respect to the complainant's age: *Carbone* at ¶ 125; *WG* at ¶ 70.

Discreditable conduct evidence

[55] The prosecution urges the court to consider Mr MacDonald's use of controlled substances—and his purportedly dissembling answers about it during cross-examination—in evaluating his credibility on the mistake-of-age issue. Additionally, the prosecution asserts that the court should consider as a credibility demerit the squalor of Mr MacDonald's apartment.

[56] In my view, these arguments are not supportable, and I decline to follow them.

[57] Mr MacDonald is not being tried for substance use or for poor housekeeping.

[58] His use of contraband substances does not assist the prosecution in negativing the mistake-of-age defence, and does not assist the court in determining whether the defence has an air of reality to it. Further, far from evasive or minimizing, Mr MacDonald's testimony on the subject was pretty much in line with what EH told the court: Mr Bonnar was the drug supplier, and there was never a sex-for-drugs barter in her relationship with Mr MacDonald.

[59] EH described Mr MacDonald's apartment as "very gross" and "absolutely disgusting"; there were "prophylactics on the floor and liquor bottles everywhere." A video recording (Exhibit 2) made during the search conducted by police at the apartment when Mr MacDonald was arrested demonstrates that EH was accurate in her description of the living conditions there. However, none of this would raise questions about the ability of Mr MacDonald to give credible and accurate evidence.

[60] Discreditable-conduct evidence was described in *R v Robertson*, [1987] SCJ No 33 at ¶ 46 as conduct or information about an accused person—other than conduct that forms the subject matter of the offence being tried—which reasonable persons would likely find morally objectionable. As it is evidence extrinsic to the elements of the charges being tried, it ought to be treated as presumptively inadmissible: see *R v Taweel*, 2015 NSCA 107. In this case, the

evidence of Mr MacDonald's substance use and evidence about the condition of his apartment were bound to come before the court as part of the narrative of EH's description of the time she spent with Mr MacDonald when they were sexually active. However, the fact that the court heard the evidence does not mean that the court is unrestrained in its use of it.

[61] In my view, this evidence is of little probative value: there is no link between the condition of one's living space and the credibility or reliability of someone who occupies that space.

[62] Similarly, the fact that a person might be reticent to be fully up front about substance use does not mean that the person cannot offer credible and reliable testimony about other important things that are actually relevant and material. In any event, as I found earlier, Mr MacDonald appeared to me to be truthful about his use of substances. He was ashamed that he had relapsed; however, that shame seemed entirely genuine.

[63] This evidence is not relevant to anything, not even propensity. Its probative value is non-existent; its prejudicial effect—if used for the purpose urged by the prosecution—would be substantial.

Air of reality in this case

[64] There is some air of reality to Mr MacDonald's defence that he believed EH and KB were 16 years of age or older:

- On direct examination, EH could not recall initially whether she had told Mr MacDonald her real age; that her memory might have been refreshed during the trial on that point does not satisfy me that it was improved.
- EH acknowledged that she had lied to Mr MacDonald's roommate about her age.
- EH acknowledged that a friend might have lied to Mr MacDonald about her age.
- Tara Hughes testified that EH had told her in Mr MacDonald's presence that she was 18 years old. Her evidence on this point did not seem outlandish, given EH's initial uncertainty about whether she had discussed her age with Mr MacDonald, and her acknowledgment that she had misrepresented her age to Mr Bonnar.
- Mr MacDonald testified that EH and KB told him repeatedly that they were 17 or 18 years old.

[65] Accordingly, there is more than a mere assertion from Mr MacDonald that EH had described herself as being 18 years old; there is an air of reality to the defence. Although it is only Mr MacDonald's assertion that KB had told him she was 17 or 18, I shall assume, for the sake of argument, that an air of reality exists regarding that issue, also.

The existence of an air of reality is not the final step

[66] The existence of an air of reality regarding a defence means that the court must grapple with that defence.

[67] However, the mere existence of an air of reality is not, of itself, definitively exonerating, as the prosecution may seek to negate the proposed defence; should it do so, the prosecution is subject, as noted earlier, to a proof-beyond-a-reasonable doubt standard.

All reasonable steps/honest belief

[68] In analyzing the mistake-of-age defence asserted by Mr MacDonald in this case, I observe that people who engage in sexual activity do not do so in circumstances of life-sustaining urgency. There is always time for each participant to consider the needs and rights of others. Is everyone consenting to what is about to take place? Has consent been communicated, and are the terms

of it clear? Does everyone have the capacity to consent? Is everyone of the age of consent? Does the intended activity create a health risk? If so, what steps can be taken to lessen or eliminate it? Does the intended act respect reproductive choice?

[69] I agree with the argument advanced by the prosecution. While it might take a refined level of judgment to answer some of these questions, the age-of-consent piece should be straightforward: when there is cause for uncertainty, a person should take steps to verify age with something that offers certainty, such as a proof-of-age ID. Is there anything complex or recondite in that? This does not involve the presentation of ambassadorial credentials. Youthful-looking people get carded all the time when buying tobacco, liquor or cannabis, or when trying to enter licensed establishments. Birth-dated identity cards are ubiquitous: drivers' licences, provincial ID cards, provincial health cards, student ID cards, all abound. People have to show IDs to check into hotels, cash cheques and do other banking, board aircraft or go to the gym. I would suggest that a reasonable step is one that seeks a reasonably reliable source of information. Self reports of age, or subjective inferences based on momentary observations are steps that are vulnerable to error; that much should be obvious.

An identification document is a reliable, uncomplicated, normal and customary proof of age.

[70] But what if an intended sexual partner is unable to produce an ID—what then? It seems to me that the what-then next step would be to press pause and not go any further. I would suggest that the inability or unwillingness of a sexual partner to present an ID would be a very strong indicator that the person whose age needs to be nailed down might be underage, and would be an unmistakable signal for a person who is really trying to take all reasonable steps that additional precaution is needed.

[71] Mr MacDonald acknowledged on cross-examination that he did not take that bare-minimum step of asking EH or KB to show him a proof-of-age ID.

[72] Consider the circumstances:

- Mr MacDonald barely knew either EH or KB—they were recent acquaintances.

- Neither EH nor KB had the appearance of mature adults; they both appeared to be youthful adolescents; EH still has that appearance, from what I observed of her in the court room. The police-surveillance photography

showed KB to be very youthful; the selfies taken by Mr MacDonald with KB, the same.

- He did not know either of their families.
- He knew that they lived in a group home.
- Police had been showing up at his apartment looking for kids from the group home.
- When he met EH, MacDonald felt that she looked young, and didn't believe her when she told him she was 18 years old.
- Mr MacDonald suspected that EH and KB were underage.

[73] Any one of these rapidly flashing red lights ought to have alarmed Mr MacDonald enough into asking to see a proof of age, or, failing that, contacting a responsible adult.

[74] Even if Mr MacDonald asked EH and KB about their ages repeatedly, and even if they gave him the same answer that they were 17 or 18, that repetition cannot be taken as a reasonable step. Indeed, the fact that Mr MacDonald had to keep asking allows the court to infer that he considered their answers unreliable. He told me as much when he admitted on cross that he did not believe EH, and that he suspected both EH and KB were underage.

[75] In my view, Mr MacDonald was less concerned about age and more concerned about getting to the sexual action.

[76] I believe Mr MacDonald's evidence:

- I believe him when he says he suspected EH and KB were underage,
- I believe him that he doubted their self-reporting of their ages.
- I believe him that EH and KB looked young, because they do look young. EH could pass for 15 today, and KB appeared very young in the surveillance and selfie photography.

[77] This does not involve ensnaring Mr MacDonald in a single, improvident answer given during cross-examination. Rather, it is a theme the runs through most of his testimony on cross. He suspected EH and KB were underage, but that was not going to stop him.

[78] The prosecution has proven beyond a reasonable doubt that Mr MacDonald failed to take all reasonable steps—indeed, failed to take any reasonable step in the context-specific circumstances of this case—to ascertain the ages of EH of KB. Asking them their ages was a non-step.

[79] Further, with respect to the essential mental element of the § 151 and § 271 charges, Mr MacDonald was aware of the elevated risk that EH and KB were underage: he barely knew either of them, believed they looked young, suspected that they were underage, and did not believe their age self-reporting. Assessing each count separately, this evidence satisfies the court that the prosecution has proven the mental element of each count beyond a reasonable doubt: Mr MacDonald knew that there was a real and substantial risk that EH was under 16 years of age, and decided to go ahead and have intercourse despite the risk; he assumed the same risk in having intimate sexualized contact with KB. This is essentially a finding that the prosecution has proven beyond a reasonable doubt that Mr MacDonald did not believe that EH and KB were at least 16 years of age.

Mere flirting and sexual purpose

[80] Next, Mr MacDonald argues that his contact with KB was not done for a sexual purpose; it was merely flirting.

[81] Section 151 of the *Code* describes a specific-intent offence: it is an element of the offence that an accused person must have had a sexual purpose in intentionally touching a child: *R v DMG*, 2022 NSCA 42 at ¶ 19; *R v NFDW*, 2021 NSCA 91 at ¶ 44; *R v BJT,* 2019 ONCA 694 at ¶ 37; *R v GB*, 2009 BCCA 88 at ¶ 24; *R v Scullion*, 2009 ABCA 291 at ¶ 3

[82] Mr MacDonald is not required to disprove the existence of a sexual purpose; it is for the prosecution to prove beyond a reasonable doubt that Mr MacDonald had a sexual purpose in mind at the time he intentionally touched KB.

[83] Exhibit 13 is made up of a series of twenty-seven photographs extracted from Mr MacDonald and KB's smartphones. In giving his evidence, Mr MacDonald identified himself and KB as the two persons depicted in the photographs.

[84] Some of the photographs are quite innocuous; however, most show Mr MacDonald and KB embracing intimately, extending their tongues toward each other (in image 9, their tongues are touching); as defence counsel described it in closing argument, "there are people half naked, kissing.".

[85] While the term "sexual purpose" is not defined in the *Code*, it has been the subject of sustained and frequent judicial interpretation. In *R v SEA*, 2023 NSSC 98 at ¶ 107, the term was taken to mean that the touching was done for the accused person's gratification or for the purpose of violating the sexual integrity of the complainant; the trier must consider not only the part of the body touched, but also the nature of the touching and the circumstances surrounding it. See also *R v Morrisey*, 2011 ABCA 150 at ¶ 21 and *R v GDG*,

2013 MBQB 244 at ¶ 100. Proof that an accused person touched a child for the accused's own sexual gratification may be sufficient to establish criminal liability, but it is not necessary.

[86] Further, the court must avoid false-dichotomy reasoning which would require the court to find that conduct must either be "flirting" or have a sexual purpose. In fact, it could be both. And I draw that inference in this case.

[87] The sexualized nature and purpose of Mr MacDonald's intimate contact with KB, depicted in most of the images in Ex 13, is unmistakable.

Adjudication on each count

[88] The prosecution has proven beyond a reasonable doubt each element of the § 151 counts:

- Mr MacDonald had intentional physical contact with EH and KB.
- The contact was for a sexual purpose.
- EH and KB were under the age of 16 years.
- Mr MacDonald failed to take all reasonable steps to ascertain their ages.

- Mr MacDonald knew that there was a risk that EH and KB were underage, but went ahead, aware of the risk.

[89] The court records convictions on each § 151 count.

[90] As the elements of § 151 and § 271 are essentially identical—*R v RV*, 2021 SCC 10 at ¶ 50 [*RV*]—the court records convictions on the two § 271 counts as well.

[91] The commission of the § 151 and § 271 offences constituted a breach of the keep-the-peace condition of Mr MacDonald's probation order that was in effect at the time. A finding of guilt will be entered for that count.

[92] The court will conditionally stay the § 271 counts in accordance with *R v Kienapple*, [1975] 1 SCR 729; I will adjourn sentencing to a later date to allow time for the filing of required material.

The W(D) formula and why it was not recited in this case

[93] This case is illustrative of the proposition that there will be times when the ritual recital of the formula in *R v W(D)*, [1991] 1 SCR 742 at ¶ 28 is neither a necessary nor sufficient step in reaching a proper adjudication or verdict: it is never sufficient, as the mere recital of the principles, without their proper application, will almost certainly constitute reversible error; it is not necessary

> in cases when, as here, the court's belief in the evidence of the accused person may actually lead to a conviction, when that evidence admits to essential elements of an offence and undermines potential complete or partial defences.

The inadvisability of § 151 and § 271 charges being laid together and the problem of overcharging

[94] I feel it necessary to comment briefly on the continuing practice of policing services to lay concurrent § 151 and § 271 charges in cases alleging the sexual abuse of children. In fairness, the information in this case was laid prior to the decision in *RV* and so did not have the benefit of the procedural guidance offered by the Supreme Court of Canada. However, informations continue to come into courts with concurrent § 151 and § 271 counts, and so the message in *RV* has not gotten through. As the Court in *RV* observed (at ¶ 54 and 64), trying § 151 and § 271 charges concurrently leads to bewilderment, confusion and erroneous reasoning when heard by a jury.

[95] Even when not before a jury, concurrent § 151 and § 271 charges represent a continuing and troubling manifestation of the phenomenon of overcharging.

[96] Overcharging is a common occurrence, as when, say, an information containing a break-enter-and-theft count squeezes out every possible included offence as a separate charge—theft, damage to property, possession. Trafficking-

related *CDSA* informations will almost always include simple-possession charges as an unnecessary add-on. Aggravated-assault and assault-causing informations will be bundled with superfluous assault counts. Weapons- and firearms-related informations will typically include every possible permutation of charge available.

[97] Overcharging is inefficient, as it adds unnecessary complexity to the adjudication of cases; unnecessary complexity contributes to delay; delay has constitutional consequences. It should be more than aspirational to expect that policing services will take seriously the guidance offered by an apex court to avoid overcharging.

JPC