IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Isenor, 2007 NSPC 70

Date: November 23, 2007
Docket: 1649882
Registry: Halifax

Her Majesty the Queen

v.

Brett Isenor

SENTENCING DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	November 23, 2007 in Shubenacadie Provincial Court
Oral decision:	November 23, 2007
Charge:	Criminal Code Section 236(b)
Counsel:	Crown - Richard Hartlen and Jill Nette Defence - David Bright, Q.C. and Jan Murray

Sentencing for Manslaughter

[1] Manslaughter is a non-intentional homicide. In this case, Mr. Moore's death was the unintended result of an unlawful assault. Mr. Isenor's conduct was blameworthy and must be punished but he is not a murderer. *(R. v. Creighton, (1993) 83 C.C.C. (3d) 346 (S.C.C.) at page 374*)

[2] It is well-settled law that a person who engages in an unlawful act, for example, an unlawful assault, is responsible for any unforeseen result. (*Creighton, supra, at page 377*) "Aggressors, once embarked on their dangerous course of conduct which may foreseeably injure others, [are required in law] to take responsibility for all the consequences that may ensure, even to death...Wherever there is a risk of harm, there is also a practical risk that some victims may die as a result of the harm." *(Creighton, supra, at page 378*)

[3] There is no statutory minimum punishment for manslaughter committed without a firearm but, in recognition that manslaughter involves the culpable killing of a human being, the maximum sentence is life imprisonment. Numerous cases have commented that the available range of sentence for a manslaughter conviction is perhaps the broadest for any offence. Because manslaughter can occur in a wide variety of circumstances, the penalties must be flexible. (*Creighton, supra, at page 375*) In Nova Scotia, the range imposed has been from a suspended sentence (*R. v. Cormier (1974), 9 N.S.R.(2d) 687 (N.S.C.A.*)), to twenty years imprisonment *(R. v. Julian, [1973] N.S.J. No. 235 (N.S.S.C., App. Div*.)) . Lenient sentences have been imposed only where very strong mitigating factors exist or where the act, though

culpable, was close to being an accident. In the great majority of manslaughter cases sentences range from four to ten years. *(R. v. Myette, [1985] N.S.J. No. 472 (N.S.S.C., App. Div.) at paragraph 47*; see also *R. v. Lawrence, [1999] N.S.J. No. 25 (N.S.C.A.) at paragraph 14*; *R. v. Francis, [2007] N.S.J. No. 277 (N.S.S.C.) at paragraph 10; R. v. Henry, [2002] N.S.J. No. 113 (N.S.C.A.*) *at paragraph 18*) The Nova Scotia Court of Appeal in *Henry* surveyed examples of mitigating factors that have influenced courts to be lenient in the imposition of manslaughter sentences.

[4] The following quote from *Creighton* is applicable to sentencing in manslaughter cases: "The criminal law must reflect not only the concerns of the accused, but the concerns of the victim and, where the victim is killed, the concerns of society for the victim's fate. Both go into the equation of justice." *(Creighton, supra, at page 381*)

Crown's Position

[5] The Crown's position, based on two recent Nova Scotia decisions, *R. v. Tower, [2007] N.S.J. No. 193 (N.S.S.C.)* and *R. v. Henry, [2002] N.S.J. No. 113 (N.S.C.A.)* is that Mr. Isenor should receive a 4 - 5 year prison term.

Defence Position

[6] The Defence acknowledges that a custodial sentence is appropriate in this case even for Mr. Isenor, a person of recognized good character with a relatively unremarkable prior record. I am not bound by that view but I agree: this is not a case for a suspended sentence and probation. The position of the Defence is that Mr.

Isenor should receive a custodial sentence of two years less a day to be served in the community as a conditional sentence. The Defence recommends conditions of house arrest and curfew with various exceptions relating to Mr. Isenor's business and family responsibilities.

[7] The issue therefore is not whether Mr. Isenor should receive a custodial sentence: the issue is the length of Mr. Isenor's custodial sentence. Should it be less than two years, qualifying it to be served in the community as the Defence proposes, or should it be a penitentiary term? A penitentiary term is a custodial sentence of two years or more. A custodial sentence of two years or more cannot be served in the community under house arrest. For a custodial sentence to be served in the community it must be less than two years and must satisfy the statutory requirements under section 742.1 of the *Criminal Code*.

Summary of Facts from Trial Decision

[8] In convicting Mr. Isenor of manslaughter in Mr. Moore's death, I found that whether Mr. Isenor punched Mr. Moore because he had been pushed past his limits of tolerance by Mr. Moore's verbal abuse as he told police, or because he decided to stop Mr. Moore's brief advance, as he testified to at trial, or some combination of both, he had not acted in self-defence. I accepted that although Mr. Isenor was apprehensive that the situation with Mr. Moore might escalate once he confronted him outside Whistlers pub, he decided to stand up to Mr. Moore's drunken behaviour by punching him. Mr. Isenor had concluded that Mr. Moore had earned himself a punch in the mouth. He expected the consequence of delivering the punch to be a pounding

from Mr. Moore so he gave it his best shot, knocking the bigger man unconscious. Mr. Isenor had not expected Mr. Moore to even fall down when he hit him, let alone get hurt badly or die. I accepted as true what Mr. Isenor told Cpl. Richardson on May 18, 2006:

> On that particular night, I just, like, enough was enough was enough ... he said enough, long enough that I wasn't gonna listen to it anymore...he deserved, after what he was doing and saying, to get a punch in the mouth. He didn't deserve to die, he didn't deserve to go to the hospital ..... I kinda made my mind up, and when I made my mind up, I expected to take a pounding and I fully expected, like, I said, that's fine, I'll take a pounding but I'm not listening to this no more, I'm just not. Like,... my friends, they said ... we've known you your whole life, you will take things to a certain point and then it doesn't matter after that, like that's my personality ... (R.v. Isenor, [2007] N.S.J. No. 389, paragraphs 126 - 127; see also paragraphs 120 - 142)

The Victim Impact Statements

[9] Mr. Moore was 37 years old when he died on May 7, 2006. He lived with Jocelyn Bain, his common-law spouse and was the well-loved brother in a family of four. His mother, Linda Nickerson, and Ms. Bain spoke of their heart-break at losing Mr. Moore. Ms. Bain referred to Mr. Moore as truly her best friend, a man she loved and did everything with. She described him as " a big man with a big heart" who was "smart, funny, adventurous and spontaneous...generous to a fault and fun loving." She has been devastated by Mr. Moore's sudden death. Ms. Nickerson spoke of Mr. Moore growing up with his brothers and their friends, saying when Mr. Moore died a part of her died too. She feels deep sadness and loss and said: "What a terrible thing

for a mother to outlive her child." Each of Mr. Moore's three brothers filed Victim Impact Statements that were read into the record by the Crown. These statements spoke not only of the significance of Mr. Moore in their lives and the loss they feel but also the bond their children had with their uncle. The brothers described how they as individuals and their family will never be the same again. Ms. Bain also mentioned Mr. Moore's daughter and son, whom I know from reviewing Mr. Moore's hospital records introduced as evidence at trial, are teenagers living out West with their mother. The Victim Impact Statements also referred to the loss to these children of their father.

[10] The Victim Impact Statements conveyed the profound and enduring love Mr. Moore's family had for him and the heart-rending pain they suffer now that he is gone.

[11] I will note that while I described Mr. Moore in my trial decision as being "loud and offensive" on April 30, 2006, his conduct did not constitute provocation of Mr. Isenor in a legal sense and played no role in my assessment of Mr. Isenor's guilt. (*R. v. Isenor, [2007] N.S.J. No. 389 at paragraph 101*) Likewise, Mr. Moore's behaviour on April 30 has no bearing whatsoever on the determination of an appropriate sentence. (*R. v. Tower, supra, at paragraph 36*)

The Offender

[12] Mr. Isenor is 35 years old and the father of two young children, a daughter aged five and a son aged four and a half months. He lives with Erin Duffy in Stewiacke where he is a well-respected business owner. He belongs to a close and loving family and has been supported throughout these proceedings by his parents and his two sisters. He has a very positive Pre-Sentence Report in which he is described as " a good man, a good father and a good business partner" by his sister, Joely Isenor. There is no indication of any difficulties with mental health issues, substance abuse, anger or aggression.

[13] Also submitted for my consideration with no objection from the Crown were a total of sixty-six letters from family, friends, neighbours and members of the community. These letters were written by:

> Family - both Mr. Isenor's sisters, brother-in-law, his parents, aunts and uncles, his common-law partner, Erin Duffy, her parents and brother
>
> Neighbours
>
> Friends, both young and old, including people who have known Mr. Isenor for all or most of his life,
>
> Employees, including a former employee
>
> Business associates
>
> Municipal politicians - Stewiacke Town councillor, Mayor of Stewiacke

> Other members of the Stewiacke community, including Mr. Isenor's family doctor

[14] The submitted letters disclose the deep affection the writers, obviously decent people themselves, have for Mr. Isenor. They describe him in glowing terms as someone who is loyal, devoted to his family and friends, lovingly involved with his two young children, kind, industrious, generous and compassionate. The letters also talk about Mr. Isenor as a source of support and comfort to families in need, including when friends suffered the tragic death of their two year old son. Members of another family wrote about Mr. Isenor's desperate efforts to try and save a friend fatally injured in a snowmobile accident in 2004. The consistent theme through all the letters was of Mr. Isenor's generosity and his dedication to family and community. The letter writers also remarked on Mr. Isenor's remorse and how the death of Mr. Moore and his role in it will remain with him for the rest of his life. As one writer said: "I fully believe there is enough pain between these two families for a lifetime."

Purpose and Principles of Sentencing

[15] 718. [Purpose] The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[16] Section 718.2 recites the other sentencing principles that the sentencing court is mandated to take into consideration, which for the purposes of this case are:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender...

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

...

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders...

[17] Sentencing has been explicitly recognized as an individualized process. *(R. v. C.A.M. (1996), 105 C.C.C. (3d) 327 (S.C.C.))* It is a process requiring an examination

of the facts of the offence and the circumstances of the offender and an assessment and weighing of the relevant sentencing principles to arrive at a fit and proper disposition. The courts have long rejected a “cookie-cutter” approach to sentencing. This was reinforced in the 1996 amendments to the *Criminal Code* which are reflected in the provisions I have recited above.

[18] The Alberta Court of Appeal has noted that the codified principles of sentencing are:

> ... designed to fulfil one of the fundamental purposes of sentencing; to preserve respect for the law. To accomplish this objective and to maintain the public's commitment to abide by the rule of law, the courts must impose just sanctions on those who transgress the law. Doing so serves two purposes. First, it ensures that the public are not demoralized by seeing criminals commit crimes with impunity. That is what happens when the sentence imposed fails to reflect the gravity of the crime committed and the offender's moral blameworthiness for it. Second, it deters potential wrongdoers by signaling to all that those who commit crimes will be held accountable for their actions. The law must educate as well as condemn. *(R. v. K.K.L., [1995] A.J. No. 434 at paragraph 27*)

[19] A just and appropriate sentence reflects the gravity of the offence and the moral blameworthiness of the offender. (*R. v. C.A.M., supra*) The proportionality principle in sentencing is reflected in section 718.1 which requires, as a fundamental principle of sentencing, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Moral Blameworthiness

[20] The sentence for manslaughter must be tailored to the degree of moral fault of the offender. (*Creighton, supra*) The offender's moral blameworthiness is a significant factor that operates to distinguish cases where a low or non-penitentiary term is appropriate and those that attract a lengthy sentence. (*Henry, supra*)

[21] In *Henry*, the Nova Scotia Court of Appeal directed that sentencing judges, while giving due weight to all the principles of sentencing, must assess the extent of moral blameworthiness in a particular case, and should consider where on the spectrum, from almost accident to almost murder, the particular offence falls. *(Henry, supra at paragraph 19*)

[22] The purpose of assessing blameworthiness is to ensure that the sentence imposed fits the degree of moral fault of the offender for the harm done. *(R. v. K.K.L., supra, at paragraph 6*) Relevant to this analysis is an examination, in a case of unlawful act manslaughter, of what the unlawful act involved. The nature and quality of the unlawful act, the method by which it was committed (was a weapon used?) and the manner in which it was committed in terms of the degree of planning and deliberation are all material factors. Other considerations include the extent of the victim's injuries, the degree of force used, the degree of violence or brutality, the perpetration of any additional gratuitous violence, the time taken to perpetrate the act and the element of chance involved in the resulting death. *(K.K.L., supra, at paragraphs 8, 23*: see also *R. v. Tower, supra, at paragraph 30*)

[23] A heightened degree of moral blameworthiness will attach where the offender knew or was wilfully blind to the fact that his unlawful act was likely to put the victim at risk of death or cause death. (*K.K.L., supra, at paragraph 14*)

[24] In Mr. Isenor's case, where, along the continuum of moral blameworthiness, between the parameters for manslaughter of near accident to near murder, do his actions and intent fall? The unlawful assault of Mr. Moore with no element of self-defence does not constitute a near accident. The case of *R. v. Stratton and Reid, [2002] N.S.J. No. 205 (N.S.S.C.)* is an example of a case of near-accident manslaughter where it was ill-fated attempts at CPR on the victim rendered unconscious by a "sleeper-hold" that had the effect of causing him to asphyxiate. In that case, the sentencing judge determined that, considering the objectives and principles of sentencing, and the fact that there was a loss of life, even though a penitentiary term was not warranted, the sentence should "border on the two year mark." He determined he was satisfied that conditional sentences of two years less a day were appropriate in all the circumstances.

[25] The Defence has equated the circumstances in Mr. Isenor's case with those in *Stratton and Reid*, asserting that the difference in how death occurred was one of methodology - the sleeper hold versus the intentional assault. But the moral blameworthiness of Mr. Stratton and Mr. Reid for their victim's death was assessed in relation to their bungled resuscitation efforts: they were not convicted of manslaughter because they inflicted an intentional assault that led to death.

[26] There is no suggestion that Mr. Isenor's assault of Mr. Moore constitutes a case of near-murder. It does not. Nor were some of the factors that heighten moral blameworthiness present: Mr. Isenor did not use a weapon or engage in additional gratuitous violence. He delivered a single blow and no more. The blow happened in a split-second. Mr. Isenor did not engage in a period of deliberation on his actions that lasted more than a matter of seconds. To his surprise, Mr. Moore went down, knocked out cold. Mr. Isenor had not anticipated this. Mr Moore was much taller and heavier than Mr. Isenor. Mr. Isenor did not know Mr. Moore's injuries were fatal and expected Mr. Moore would come looking for him to settle the score.

[27] Mr. Isenor's actions do not exactly mirror those of Mr. Henry, despite the similarity of a single punch with consequences that Mr. Isenor, like Mr. Henry, never intended. Mr. Isenor however did not engage in "predatory callousness" in assaulting " a smaller man." It was not a "cowardly attack" that amounted to "vigilante justice." He did not "silently" approach from behind, in effect, in the *Henry* case, a stealth attack. I also do not regard Mr. Isenor's actions as particularly similar to those of the offender in *Tower* on which the Crown is also relying. Mr. Tower was also described at sentencing as having "exhibited predatory callousness in his intentional assault on a smaller intoxicated man." He chose to act as an enforcer and used an "improvised weapon with great force in inflicting an injury...which was an excessive and unwarranted response to the situation at hand." He struck the victim on the back probably with two blows. The Tower decision is unclear on what direction the victim was facing when he was hit but the fact that the decision states that he was struck across the back by Mr. Tower using a baseball style swing with the shears strongly

suggests that he was at least partially turned away from Mr. Tower when he was assaulted.

[28] Mr. Isenor did not conduct himself like Mr. Henry or Mr. Tower in my opinion. Just before the punching of Mr. Moore, I found Mr. Isenor had been walking away. I found at trial that the turning, stepping toward Mr. Moore, and punching took only seconds. There was "at least some element of chance involved" in Mr. Isenor's punch having such deadly accuracy that it knocked Mr. Moore down. *(Tower, supra, at paragraph 33*)

[29] In contrasting the circumstances of this case with the facts in *Henry* and *Tower*, I want to make a comment about a Defence submission concerning my finding at trial that Mr. Isenor's claim of self-defence had an air of reality to it. As I noted in my decision (*R. v. Isenor, supra, at paragraph 102*) for the purpose of the air of reality test analysis, the evidence being relied upon by the accused is assumed to be true. The air of reality test is concerned only with whether the accused's claim of self-defence should be "put into play." I allowed the defence of self-defence to be put into play but I ultimately rejected the defence. (*paragraphs 140 and 142*) There is therefore no element of self-defence on the facts of this case to consider as a mitigating factor on sentencing.

Aggravating and Mitigating Factors

[30] I have already referred to the factors of the offence that in my opinion mitigate Mr. Isenor's moral culpability in Mr. Moore's death. His determination that Mr. Moore "deserved a punch in the mouth" and his decision to confront, with violence, Mr. Moore's verbal harassment, are aggravating features of the incident. None of the aggravating factors set out in the *Criminal Code* section 718.2 (a) (i) through (v) were present in this case.

[31] As for mitigating factors, none of the eleven factors in Henry, reviewed in *R. v. Francis, [2007] N.S.J. No. 277 (N.S.S.C.)* at paragraph 53, are present in this case other than Mr. Isenor's remorse. That remorse has throughout been tempered by Mr. Isenor's difficulty accepting that what he did was not "an accident" because he did not intend for Mr. Moore to be killed or even badly hurt. It appears from the Pre-Sentence Report that Mr. Isenor continues to believe, to some degree, that his actions were justified on the basis of Mr. Moore's behaviour and excusable because he had no intention of causing death or serious harm. A somewhat similarly qualified expression of remorse by Mr. Henry was regarded by the Nova Scotia Court of Appeal as not mitigating but instead, neutral. However, I cannot ignore the statements by so many people who have known Mr. Isenor for years and who have said how deeply remorseful he is for Mr. Moore's death. Mr. Isenor himself said to Cpl. Richardson on May 18, 2006: "I really feel bad that I had anything to do with anybody dying." He expressed a desire to reach out to Mr. Moore's family and Cpl. Richardson commented to Mr. Isenor that he saw how Mr. Isenor was struggling emotionally with what had happened. Before the court today, Mr. Isenor apologized for his actions and

said how deeply sorry he is for what happened. I accept this and, on careful examination of all that is before me, conclude that Mr. Isenor's remorse should be treated as having some mitigating effect.

[32] Good character is another factor that may mitigate a sentence. This may be acknowledged by noting that an offence is out-of-character. Mr. Isenor's assault on Mr. Moore was uncharacteristic for him. This is evidenced by Mr. Isenor's conduct on April 30, he did not go looking for trouble with Mr. Moore, and his reputation in the community. Mr. Isenor is unquestionably of previous good character and remains a highly regarded and well-loved member of his family and community. I am fully satisfied that the character traits that have earned Mr. Isenor such affection and respect remain intact. It is apparent from the testimonials of people who have known him for many years in various contexts that he has been a consistently decent and honourable person. I have been made aware that Mr. Isenor has a prior criminal record for two impaired driving charges, one for which he was sentenced in 2006 and the other from 1994. I find these offences to be unrelated to the matter before me, especially as I did not find as a fact at trial that Mr. Isenor's actions on April 30 were influenced by alcohol. I have concluded that Mr. Isenor's record is not a factor in my determination of his sentence. I do not treat it as an aggravating factor. A more serious and recent record was regarded in *Tower* as not "a major factor" in the determination of a fit and proper sentence in that case. (*paragraph 21*) I however do not regard Mr. Isenor's record, which is unrelated to the charge before me, and in the context of that charge, a relatively minor record, to be a mitigating factor. The lack of a criminal record was held by the Nova Scotia Court of Appeal to be "insufficient cause for extraordinary

leniency" and did not operate in *Henry* to moderate his moral blameworthiness for manslaughter. (*paragraphs 21 and 22*)

The Principle of Denunciation

[33] In *Henry*, the Nova Scotia Court of Appeal concluded that a conditional sentence of two years less a day imposed following Mr. Henry's guilty plea was not a "fit" sentence because it failed to adequately emphasize deterrence and denunciation and was "excessively and manifestly lenient." The Court held that it was a case where the "need for denunciation was so pressing that incarceration [was] the only suitable way in which to express society's condemnation of the offender's conduct." *(Henry, supra, at paragraph 29*) Mr. Henry received a four year prison sentence.

[34] Denunciation in sentencing has been described as the means by which the criminal law's system of values is communicated. A sentence with a denunciatory element "represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law." Judicial sentences are also intended to "positively instill the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*."(*C.A.M., supra, at paragraph 81*) It is a function of the sentencing process to maintain and affirm central societal values. Respect for the lives of other human beings and the entitlement of a person not to be deprived of their life are fundamental societal values. Whereas denunciation, through the imposition of a just and proportionate sentence, of conduct that takes a life is a legitimate objective in

sentencing, vengeance has no role in our sentencing processes. (*C.A.M., supra, at paragraph 80*)

The Principle of General Deterrence

[35] In the case of *R. v. King, [1999] N.S.J. No. 318*, the Nova Scotia Supreme Court sentencing Mr. King for manslaughter as a result of a drunken assault spoke of the need to deter others "who might find themselves in a similar circumstance..." The Court expressed hope that the sentence "might cause others to reflect before they proceed to get involved in assaulting others." *(King, supra, at paragraph 16*)

[36] General deterrence is a controversial sentencing principle that has attracted critical commentary from judges and academics. It has been described as "somewhat speculative" *(R. v. Wismayer (1997), 115 C.C.C. (3d) 18 (Ont. C.A.)* Where I see it having a bearing in this case is on the notion that what happened here was an "accident" as so many of Mr. Isenor's supporters have characterized it. It must be understood, not only by Mr. Isenor, but also by the broader community, that where an unlawful assault leads to a person dying, it is a culpable homicide. The fact that the person committing the assault, in this case, Mr. Isenor, did not intend to kill his victim is what makes it manslaughter and not murder. Mr. Isenor understands this now, although he was struggling on May 18, 2006 to grasp the legal implications of his actions when he asked Cpl. Richardson: "Why isn't it just assault, just because he died?" As Cpl. Richardson explained at the time, everything changed for Mr. Isenor legally when Mr. Moore died, irrespective of Mr. Isenor's intention to do nothing more than punch him.

[37] The Crown has conceded that specific deterrence and rehabilitation are not issues in Mr. Isenor's case. That is borne out by the statements in the support letters and Mr. Isenor's own comments. Mr. Isenor said in his police interview on May 18, 2006 he had learned "a big lesson" and that anyone could say anything to him now, he would walk away. (*Isenor, supra, at paragraph 136*) However, others in the community must also understand that they too would be required under the law to do the same in circumstances like the ones that Mr. Isenor found himself in.

[38] A penitentiary term of four years for manslaughter was upheld on appeal in a case where it was determined that the rehabilitation and deterrence of the accused was not really a factor but third party deterrence was. Also cited in support of confirming the sentence of the trial court was the importance of the sentence being one that would maintain public confidence in the administration of justice. *(R. v. Campbell, [1977] N.S.J. No. 443 (N.S.S.C., App. Div.) at paragraphs 19-20*.)

[39] The role of just sentencing in maintaining public confidence in the system of justice is reflected in section 718 *Criminal Code* where it is stated that the fundamental purpose of sentencing, amongst other objectives, is to contribute to "respect for the law".

The Principle of Restraint

[40] Mr. Isenor's sentence must reflect the degree of his moral blameworthiness. That has to be fixed before the issue of whether the sentence can be served in the

community even becomes relevant. If Mr. Isenor's moral blameworthiness justifies a sentence of two years or more, then under section 742.1(a) of the *Criminal Code* a conditional sentence is not an option. The sentencing provisions of the *Criminal Code* that emphasize the principles of restraint in sentencing, sections 718.2 (d) and (e) are qualified. These provisions require that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances *(section 718.2(d)*) and that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders. (*section 718.2(e))* These provisions have been interpreted to mean that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. *(R. v. Gladue (1993), 133 C.C.C.(3d) 385 (S.C.C.) at paragraph 40*) When considering the principle of restraint in this case, I must ask myself if it is reasonable to impose a custodial sentence of less than two years in all the circumstances of this case?

[41] As I said earlier, this is not a case of a near-accident. It was not an intentional killing but it was an intentional assault and that intentional assault resulted in a man dying. A sentence of two years less a day does not, in my considered opinion, adequately reflect the gravity of the offence and the degree to which Mr. Isenor's actions were responsible for what happened. Mr. Moore died because Mr. Isenor, having reached the outer limits of his tolerance, punched him in the face and knocked him to the ground where he fatally hit his head. I do however regard this case as distinguishable from both *Henry* and *Tower* as I have discussed. But I am unable to conclude, even given those distinctions, that this is a case that comes within the rarely applicable parameters for manslaughter sentencing of less than two years custody. I note that Mr. Isenor is seeking the same sentence imposed on Mr. Stratton and Mr.

Reid, offenders whose moral culpability for manslaughter was, in my opinion, less than Mr. Isenor's.

[42] Having decided that a sentence of two years less a day does not adequately express the denunciation required in the circumstances of this case, the issue of whether the other criteria for a conditional sentence are satisfied does not come into play. While I accept the jurisprudence assembled by the Defence and the authoritative statements in such cases as R. v. *Proulx (2000), 140 C.C.C. (3d) 449 (S.C.C.)* and *Wismayer, supra*, that conditional sentences with strict conditions can satisfy the sentencing imperatives of denunciation and deterrence and can be sufficiently punitive and stigmatizing, perhaps especially in a small community, and that conditional sentences are not lenient sentences, as I have said, the facts of this case do not lead me to conclude that a conditional sentence is the appropriate sentence here.

[43] I want to note that I have carefully reviewed and considered all the cases provided by the Defence. I have paid particular attention to the cases where conditional sentences were imposed for manslaughter convictions, referenced in paragraphs 92 - 110 of the Defence brief. I concluded that the *Henry* case in particular is the most relevant to my analysis. I do want to comment on *R. v. Parker, (1997) N.S.J. No. 194 (N.S.C.A.)* which the Defence has submitted should be seen as relevant to the sentencing of Mr. Isenor. Mr. Parker received concurrent conditional sentences of two years less a day for dangerous driving causing the deaths of two sisters. His sentence was upheld on appeal. The Nova Scotia Court of Appeal commented on Mr. Parker's moral culpability and criminal liability but distinguished his crime "from an intentional criminal undertaking." The Court used as its examples drug trafficking or

fraud. Here, the death of Mr. Moore resulted from an intentional and unlawful assault. There are two other critical distinctions between *Parker* and the circumstances of Mr. Isenor's case. The Court of Appeal noted that there was "ample authority" for dangerous driving attracting non-custodial sentences pointing to courts being satisfied that denunciation and general deterrence can be effected in such cases without resorting to incarceration. As well, it was observed that dangerous driving causing death carries a maximum penalty of 14 years imprisonment. Non-custodial sentences for manslaughter on the other hand, which carries a maximum sentence of life imprisonment, are the exception, and the circumstances of the offence have to have been exceptional.

[44] I have indicated I find dissimilarities between the *Henry* and *Tower* cases where penitentiary terms of four and five years respectively were imposed. I have taken these sentences into account and the principle of parity, but I am satisfied that Mr. Isenor's actions were different enough from those cases that a lower prison term is warranted and I am therefore imposing on you, Mr. Isenor, a sentence of three years to be served in a federal penitentiary. The length of this sentence has nothing to do with the value of the lives of the victims in any of these cases. I have assessed this to be the appropriate sentence given the circumstances of this case and the degree of Mr. Isenor's moral blameworthiness for the death of Mr. Moore.

[45] Mr. Isenor's good character, would be, along with other factors, highly relevant in considering whether a sentence of two years less a day could be served in the community without endangering the safety of the community. Had I determined that the custodial term should be under two years I would have concluded that Mr. Isenor

posed no risk to the community. No issues have been identified to suggest he would. But that issue is only examined once it has been determined that the term of Mr. Isenor's custodial sentence falls within what is mandated for a conditional sentence.

[46] In closing I want to indicate my understanding that this sentence means further hardships and pain for Mr. Isenor's family, especially his children, employees, friends and neighbours. It will do little to ease the terrible suffering of Mr. Moore's family who must continue to face their lives without him. Mr. Isenor will, as a number of his supporters have said, bear the emotional burden of these events with him likely for the rest of his life. I am imposing a sentence on him that, unless successfully appealed, represents the legal consequences for his actions. Once that sentence is served he will be entitled to live once more as a member of the community and move on with his life. That must be understood and respected by all. However remote it may seem now, I hope one day there may be the possibility of some healing for the families and community here even in spite of the terrible loss of Mr. Moore and its consequences.

[47] I thank counsel for all of your efforts throughout this very difficult and tragic case.

Anne S. Derrick
Judge of the Provincial Court of Nova Scotia