PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Bowser*, 2016 NSPC 68

Date: 2016-09-29
Docket: 2379172, 2739173
2379175, 2739176
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Joseph Bowser and Ricky Cameron

Judge:	The Honourable Judge Theodore Tax,
Heard:	July 22, 2013; July 23, 2013; July 24, 2013; March 26, 2014; April 2, 2014; April 30, 2014; July 25, 2014; Dec 5, 2014; February 13, 2015; February 23, 2015; March 5, 2015; May 20, 2015; July 27, 2015; February 2, 2016; April 4, 2016, April 25, 2016; September 6, 2016 in Dartmouth, Nova Scotia
Decision	September 29, 2016
Charge:	Section 355(a); Section 334(b) and Section 348(1)(b) of the Criminal Code
Counsel:	Peter Craig, for the Crown Bernard Thibault, for the Defence of Joseph Bowser Antonios Amoud, for the Defence of Ricky Cameron

By the Court:

INTRODUCTION:

[1] Upon the completion of thirteen days of trial evidence, which commenced on July 22, 2013 and ended on July 27, 2015, Mr. Bowser and Mr. Cameron commenced a section 11(b) **Charter** application. The Court's reported decision *R. v. Joseph Bowser and Ricky Cameron* [2016 NSPC 34] which dismissed the **Charter** application of both accused was delivered on April 14, 2016. Mr. Bowser and Mr. Cameron were found guilty by the Court on each of the two charges that they were facing in the Court's unreported decision on the substantive trial issues which was delivered on April 25, 2016. The Crown had proceeded by indictment on all of the charges before the Court.

[2] Mr. Bowser was found guilty of unlawfully breaking into and entering the business of Mather's Freight Management situated at 165 Burbridge Avenue, Dartmouth, Nova Scotia, and thereby committing the indictable offence of theft contrary to Section 348(1)(b) of the **Criminal Code** between October 21, 2011 and October 24, 2011.

[3] Mr. Cameron was found guilty of unlawfully stealing property of a total value not exceeding $5000, the property of Mather's Freight Management, at or near Dartmouth, Nova Scotia, contrary to Section 334(b) of the **Criminal Code**, between the dates of October 21, 2011 and October 24, 2011.

[4] Finally, Mr. Joseph Bowser and Mr. Ricky Cameron were jointly charged and were both found guilty of being in possession of stolen property of the total value exceeding $5000, the property of Mather's Freight Management, knowing that it was obtained by commission in Canada and indictable offence, to wit, theft, contrary to Section 355(a) of the **Criminal Code** between October 21, 2011 and October 24, 2011 at or near Dartmouth, Nova Scotia.

[5] The issue for the Court to determine is a fit and appropriate sentence, taking into account all of the relevant purposes and principles of sentencing in all the circumstances of the two offenders and the offences for which they have been found guilty, following a trial.

POSITIONS OF THE PARTIES:

[6] The Crown Attorney submits that a fit and appropriate sentence ought to take into account the objective gravity of the offences for which the two offenders were convicted - for the offence of break entry and theft from a place other than a

dwelling house contrary to Section 348(1)(e) of the **Criminal Code,** there is a maximum penalty not exceeding ten years of imprisonment and the same penalty for the indictable offence of possession of stolen property in excess of $5000 contrary to Section 355(a) of the **Code**. For the theft under $5000 charge contrary to Section 334(b) of the **Code**, Mr. Cameron faces a maximum penalty of two years in custody. The Crown Attorney submits that the *Keinapple* principle does not apply in the circumstances of this case, but the Court will have to take into account the principle of totality and determine whether the sentences for each of the offences will be served on a consecutive or a concurrent basis for each offender.

[7] It is the positon of the Crown that when the Court takes into account the relevant purposes and principles of sentencing, it must also consider the presence of several aggravating factors and the few, if any, mitigating factors that are present. It should also take into account the three-year imprisonment "starting point" or "benchmark" for break and enter offences, which may move up or down depending on mitigating and aggravating factors, which has been established by the Nova Scotia Court of Appeal in cases such as *R. v. Zong* [1986] N.S.J. 2007 (NSCA), *R. v. McAllister* [2008] NSCA 103 and *R. v. Adams* [2010] NSCA 42.

The Crown submits that both offenders should be sentenced to a period of custody in the range of four years to be served in a penitentiary.

[8] Defence Counsel for Mr. Bowser submits that the Section 355(a) charge of possession of stolen property should be subject to a conditional stay based on the rule against multiple convictions pursuant to *R. v. Keinapple*, [1974] CanLii 14 (SCC). Defence Counsel acknowledges that principles of deterrence and denunciation are the predominant sentencing considerations in these cases, but the appropriate sentence should be also be proportionate to the gravity of the offence and the degree of responsibility of the offender. The Court should also take into account the principle of restraint, since Mr. Bowser was a youthful first time adult offender at the time of the offences.

[9] It is the position of the Defence that the appropriate sentence, in the circumstances of both the offences and the personal circumstances of Mr. Bowser, would be less than two years of incarceration. Counsel points to the fact that Mr. Bowser is a committed father, hard worker, self-employed and the only source of income for his young children and his partner. He has been making efforts to address substance abuse and mental health issues and the Court should take into account that he has been under very restrictive bail conditions for almost 5 years, which included a house arrest with exceptions. Furthermore, Defence Counsel

submits that the provisions of the **Criminal Code**, which were in place in October 2011, would allow the Court to order a Conditional Sentence Order for a term of imprisonment to be served in the community. In his opinion, that order would be consistent with the fundamental purposes and principles of sentencing and Mr. Bowser would not endanger the safety of the community.

[10] Defence Counsel for Mr. Cameron agrees with the Crown Attorney with respect to the relevant purposes and principles of sentencing that must be applied by the Court on the sentencing decision. However, Defence Counsel submits that the appropriate sentence for Mr. Cameron should take into account, first and foremost, that he was not charged with, nor convicted of, break, enter and commit the indictable offence of theft. Therefore, the sentencing decision of the Court must focus on the two offences for which Mr. Cameron was convicted. In addition, Defence Counsel submits that Mr. Cameron's personal circumstances of cognitive and literacy issues, ADHD and being subject to abuse as a child, as well as considering *Gladue* factors given his aboriginal background, should all be considered as mitigating factors by the Court. In addition, Mr. Cameron was also subject to restrictive bail conditions for several years. Counsel also points out that, while he is presently serving a federal sentence for an unrelated conviction, his parole eligibility has been delayed, pending the outcome of the Court's sentencing

decision. Taking into account the sentencing principles of parity and restraint, Defence Counsel for Mr. Cameron submits that the appropriate sentence would be a custodial sentence in the range of six to nine months.

CIRCUMSTANCES OF THE OFFENCES:

[11] As indicated at the outset of this decision, the Court's finding that the facts and circumstances in relation to the charges for which Mr. Bowser and Mr. Cameron were convicted were set out in detail in the Court's unreported decision delivered on April 25, 2016. The following is an overview and description of the circumstances of the offences and the key factual findings and reasonable inferences from the proven facts in relation to the break, enter and theft of property from Mather's Freight Management, located at 165 Burbridge Avenue, Dartmouth, Nova Scotia, between October 21, 2011 and October 24, 2011.

[12] Mather's Freight Management is a storage facility and a freight forwarder. In this case, they were the "bailees" of the property that was stolen from their business sometime after closing for the day on Friday, October 21, 2011 and before that business opened on Monday, October 24, 2011. Witnesses from Mather's Freight established that the nature of the property stolen was relatively unique, as it was welding leads, braided copper wire and jacketed copper wire with either some

sort of rubber or PVC coating or an aluminum coating which was stored on pallets or rolled around large wooden spools. The evidence established that all of the welding leads, copper wire, etc., had a very specific purpose and was to be used exclusively for industrial and commercial purposes. The stolen items were not for household use.

[13] Since there was no conclusive video surveillance nor any fingerprint evidence at the site of the break-in and entry in the Mather's Freight yard, the real issue in dispute during the trial was whether the direct and circumstantial evidence established, beyond a reasonable doubt, the identification of the perpetrators of the offences before the Court.

[14] The evidence established that the perpetrators of the offence had cut a hole in the fence surrounding the Mather's Freight compound from an adjoining property where there were two relatively distinct sets of tire tread impressions left in the soft sand and gravel of the adjoining property. The distinct tire tread impressions appeared to be made by the front and back tires of the same vehicle. In addition, very near those tire tread impressions, on Monday morning of October 24, 2011, police officers located of pair of bolt cutters and a "fresh and new" McDonald's restaurant receipt dated October 23, 2011 with the timestamp of 10:44 PM from the restaurant located at 144 Main Street in Dartmouth, Nova Scotia. This

was only 9 hours before Mather's Freight opened for business on Monday, October 24, 2011. Based upon those proven facts, the Court inferred that the receipt had not been deposited there by natural causes, such as the wind, but rather, it ended up there, by being accidentally dropped there by one of the perpetrators to the break and enter at Mather's Freight.

[15] Based upon the information, police officers attended at the McDonald's Restaurant located on Main Street in Dartmouth. They reviewed their video surveillance evidence for the period of time corresponding to the receipt which they seized. In addition, just prior to going to the McDonald's restaurant on the morning of October 25, 2011, police officers received a Crime Stopper's tip, which was only introduced for the narrative, but led them to believe that Mr. Bowser may have recently come into possession of a large amount of stolen copper wire. As a result, Mr. Bowser became the "focus" of their investigation. After viewing the video surveillance of the drive-through lane at the McDonald's restaurant, police officers noted that, the people who ordered the food which corresponded to the date and time of the receipt found at the site of the break-in were driving a late model, brown Chevrolet pickup truck with a temporary vehicle permit sticker located on the passenger side of the rear window of the cab of the truck. As the video was playing, the officers recognized the male driver, but could not identify

the passenger who was in the vehicle. In addition, as the two people in the truck were waiting for their order to be completed, the officers identified Mr. Joseph Bowser as the person who walked over to that truck and had a short conversation with the two people in the truck before walking away.

[16] On October 25, 2011, approximately one day after the break-in, entry and theft from Mather's Freight was reported, police officers obtained a warrant to search Mr. Bowser's house located at 14 Herbert Street, Dartmouth, Nova Scotia. They also obtained a warrant to seize and search the late-model, brown pickup truck seen in the McDonald's surveillance video, which was parked in front of Mr. Bowser's residence on the afternoon of October 25, 2011. Police officers were confident that it was the same late-model, brown pickup truck with the same, relatively unique roof light configuration, rust damage, the rusted square trailer hitch with a temporary vehicle permit sticker on the rear window of the passenger side of the cab as seen in the McDonald's surveillance video. During the search of that the truck, in addition to bits and pieces of copper wire and other pieces of items which appeared to be similar to items taken from Mather's Freight, police officers found the Certificate of Registration for that truck which confirmed that it had been recently purchased, with the ownership of the vehicle being placed in the name of Mr. Bowser's wife.

[17] During the search of Mr. Bowser's residence, police officers located aluminum protective wrap similar to the type of wrapping around copper electrical cables, rubber sheathing with specific numbering that would have been over copper wire, pieces of copper wire underneath aluminum sheathing and larger black cable, all of which was similar to the items that had been stolen from Mather's Freight. There were a number of utility knives in the basement of Mr. Bowser's residence which could have been used to remove the rubber sheathing from the copper wire as well as bolt cutters which could have been used to cut the connectors off the copper wire. In addition, police officers found bits and pieces of copper wire, rubber sheathing and connectors with the commercial marking "Matsan", on the lower level of Mr. Bowser's house, as well as in the bed of the brown pickup truck that was parked in front of his house. The witnesses from Mather's Freight identified those items as being either identical or similar to the type of products which had been stolen from their storage facility.

[18] During the search of the residence on October 25, 2011, in a bedroom on the lower level, police officers found personal effects of Mr. Bowser and a Dartmouth Metals and Bottles Ltd receipt in the amount of $5661.90 for the sale of 2097 pounds of number one grade copper. Based upon that information, police officers attended at Dartmouth Metals, viewed video surveillance of the transactions in

question and obtained copies of the receipts. The video surveillance evidence of those transactions established that, on the morning of October 24, 2011, Mr. Bowser's brown pickup truck with the unique roof light configuration and the temporary vehicle permit sticker on the passenger side of the rear window to the cab, being driven by an unidentified male, made two deliveries of products for recycling at Dartmouth Metals. Police officers obtained copies of the invoices issued by Dartmouth Metals for the 3 transactions that they had viewed on the video surveillance of October 24, 2011 at 7:49 AM, at 9:15 AM and at 10:14 AM.

[19] In the video surveillance of all three of the Dartmouth Metals transactions shown to the Court, the staff of Dartmouth Metals had noted that the licence plate number of a two tone Buick Rendezvous SUV was involved in the transactions. The evidence established that the Dartmouth Metals staff had been specifically directed to note down the licence plate numbers of the vehicles involved because the owner of Dartmouth Metals had become suspicious of the fact that some young people were coming in with "large" amounts of copper wire for sale. The owner of Dartmouth Metals stated that, in his experience, it was very unusual for individual people, as opposed to corporate electrical companies, to come in with large volumes of high quality copper wire. As a result, he asked his staff to note the

licence plate number of the vehicles in which those people arrived, since they did not require a vendor to produce photo identification, at that time.

[20] The licence plate number recorded for the three transactions on the video surveillance was Nova Scotia plate number EKR OO6, associated with a Buick Rendezvous SUV owned by Mr. Ricky Cameron. Although the video surveillance of Dartmouth Metals was not of the best quality, the Court found that it was Mr. Cameron's SUV and, that he was the driver of that vehicle when it arrived at Dartmouth Metals during all three excerpts of video surveillance. On the last two occasions, when Mr. Cameron arrived at Dartmouth Metals in his Buick Rendezvous SUV, the Court found that he was accompanied by Mr. Bowser in the passenger seat of his vehicle. On those two occasions, Mr. Bowser's brown pickup truck, with the temporary vehicle permit sticker on the passenger side of the rear window in the cab as well as its unique roof light configuration, arrived at Dartmouth Metals moments after Mr. Cameron's vehicle. Mr. Bowser's truck was being driven by an unidentified male, who joined Mr. Bowser and Mr. Cameron to walk into and out of Dartmouth Metals together. In those circumstances, the Court concluded that Mr. Bowser and Mr. Cameron were acting in concert with that unidentified male in making deliveries of copper wire to Dartmouth Metals on the latter two occasions after they arrived, moments apart, in two vehicles.

[21] In addition, the evidence in the trial established through a receipt found in Mr. Cameron's SUV, that his SUV was at the Esso service station located at 160 Main Street, Dartmouth, buying $30 worth of gas at precisely the same time as the people in Mr. Bowser's truck placed their order at McDonalds, namely, at 10:44 PM on October 23, 2011. The Court found that it was reasonable to infer that Mr. Cameron was either at the next building or very close to the McDonald's restaurant located at 144 Main Street, on the same side of the street. Since Mr. Bowser had walked into view on the McDonald's surveillance video to speak with the two people who were in his brown pickup truck, and he had walked away from that truck prior to the truck leaving the restaurant, the Court inferred that Mr. Bowser had arrived at or near the McDonald's restaurant with someone else. Furthermore, since the McDonald's restaurant receipt was found near the site of the break-in at Mather's Freight, it was obvious that the perpetrators of the break-in had arrived at that site sometime after 11:00 PM on Sunday, October 23rd, 2011. Based upon all of those proven facts, and the fact that Mr. Bowser and Mr. Cameron were identified as two of the people who brought over 3000 pounds of number one grade copper wire to Dartmouth Metals during the early morning hours of October 24, 2011, the Court concluded that it was reasonable to infer that they had been together the previous evening and that Mr. Cameron was, at least, involved in the

stripping of the sheathing from the copper wire in order for him to have been in a position to deliver an significant amount of copper wire to Dartmouth Metals before 8:00 AM on Monday, October 24, 2011.

[22] Based upon the doctrine of recent possession established by the direct and circumstantial evidence, the Court concluded that Mr. Bowser had been one of the principal parties in the break-in, entry and theft from Mather's Freight. The Court also concluded that there were similarities between the copper wire and welding leads taken from Mather's Freight to the pieces of copper wire and welding leads found in Mr. Bowser's house and in his brown pickup truck. In addition, the two different tire tread impressions in the sand and gravel next to the site of the break-in were matched to the two different front and back tires on the Mr. Bowser's late-model brown pickup truck.

[23] The Court also concluded that it was impossible for the McDonald's receipt to have blown several kilometers from Main Street in Dartmouth to the area of Mather's Freight located in the Burnside region of Dartmouth and the only reasonable inference is that it was left there by one of the perpetrators of the break-in, given the time and date of the break-in and the time and date of that receipt. In addition, the Court held that the doctrine of recent possession had been established by the fact that Mr. Bowser and Mr. Cameron arrived together at Dartmouth

Metals in Mr. Cameron's Buick Rendezvous SUV about 9:00 AM and again at about 10:15 AM, on Monday, October 24, 2011 with, what the owner of Dartmouth Metals referred to as, a "large" amount of number one grade copper wire to be coming from individuals as opposed to corporate clients. In those circumstances, the Court concluded that Mr. Bowser and Mr. Cameron were in very recent possession of a large amount of high quality copper wire which was found to be, either identical to or, at the least, very similar to the copper wire and welding leads that had been stolen over the weekend from the Mather's Freight storage facility.

[24] In the final analysis, the Court concluded, beyond a reasonable doubt, that based upon the direct and very compelling circumstantial evidence, that Mr. Bowser had committed the break enter and theft of the copper wire and welding leads from Mather's Freight with the assistance of other unidentified accomplices. In addition, Mr. Bowser and Mr. Cameron were found to be in possession of the stolen property during the early morning hours of Monday, October 24, 2011 when they received over $8000 for the sale of number one grade copper wire to Dartmouth Metals. Mr. Cameron was also found guilty of theft of copper wire contrary to Section 334(b) of the **Criminal Code** as the Court had concluded that sometime during that weekend and certainly by the morning of October 24, 2011,

he had committed a theft by virtue of his fraudulently taking the copper wire and welding leads without any color of right and converting that property to his own use with the intent pursuant to Subsection 322(a) of the **Code** to absolutely deprive the owner of it and by virtue of Subsection 322(d) of the **Code**, that he had dealt with the stolen property in such a manner that it could not be restored to the condition in which it was, at the time it was taken or converted.

[25] The evidence of witnesses from Mather's Freight Management established that retail value of the copper wire and welding leads stolen from their storage facility was estimated to be $38,000. The evidence also established that Dartmouth Metals had paid Mr. Bowser and Mr. Cameron an amount between $8000 and $9000 on the morning of October 24, 2011, when they delivered over 3150 pounds of number one grade copper wire to Dartmouth Metals for recycling in Mr. Cameron's SUV and Mr. Bowser's pickup truck.

CIRCUMSTANCES OF THE OFFENDERS:

[26] Mr. Bowser is now 27 years old. He was 22 years old at the time of these offences. He has been in a relationship with Ms. Latisha Bowser for some time and, they share a five-year-old son who recently started school and they have a second son who will be one-year-old later this year. Mr. Bowser was not living

with Ms. Bowser at the time of the writing of the Pre-Sentence Report ("PSR") due to his personal issues, but he visits his children on a regular basis and his income was the sole source of financial support for his girlfriend and children.

[27] Mr. Bowser has a grade ten education, but later took General Education Development and upgrading at the Nova Scotia Community College. He is self-employed, owning a business with his father, which does cleaning, moving and general labor jobs. He expressed an interest in taking a business administration course to help him run his business. Mr. Bowser has always had some type of employment. Prior to becoming involved in opening a business with his father for the last three and a half years, there was a gap in his employment. More recently, Mr. Bowser's income has been slowed due to the matters before the court and his health issues, but he is able to support himself and his family.

[28] Mr. Bowser advised the probation officer that, in January, 2016, he experienced some mental health issues which required him to attend the Abbey Lane Hospital on in-patient basis. Medical reports were provided to the court to provide some of the details with respect to his admission, treatment and release from the hospital. The primary concern was an addiction to hydromorphone which caused a psychosis. Mr. Bowser has plans to follow his recovery program by attending the Anchorage Program run by The Salvation Army. During the

sentencing hearing, Defence Counsel for Mr. Bowser submitted a letter of acceptance and an outline of the six-month residential program for the Court's consideration if the Court concluded that the program was deemed appropriate in its order. Mr. Bowser also advised the Probation Officer that he now has a smaller group of friends who are positive and pro-social and he has tried to distance himself from negative peers.

[29] The probation officer noted that Mr. Bowser was asked to provide collateral contacts for the PSR, and have them contact the probation officer, but no one contacted the probation officer. Therefore, the information contained in the PSR is only based on information from the offender and his Correctional Services file information.

[30] Finally, the Crown Attorney noted that Mr. Bowser did not have a prior adult criminal record at the time of the offences. However, Mr. Bowser has since been convicted of offences as an adult which occurred before the charges before the Court for the possession of stolen property under $5000 contrary to Section 355(b) of the **Criminal Code**. The date of that offence was May 8, 2011 and he was sentenced to a $200 fine on March 8, 2012. In addition, since being placed on a recognizance for the matters before the Court, Mr. Bowser was ordered to serve 25 days of intermittent custody for a failure to comply with the conditions of his

recognizance contrary to Section 145(3) **Code** on April 5, 2012. He was also ordered to serve 30 days of intermittent custody on June 11, 2012 for a Section 145(3) **Code** charge, as well as, a 90 day sentence of intermittent custody for two offences contrary to Section 145(3) of the **Code** which was ordered on April 14, 2014. Finally, he was ordered to serve a sentence of 90 days of intermittent custody for failure to comply with the conditions of his recognizance on October 29, 2014 in relation to the offence date of July 24, 2013.

[31] During the submissions of counsel, the Crown Attorney observed that the JEIN report attached to the PSR referred to two related convictions as young person under the **Youth Criminal Justice Act**. Mr. Bowser was sentenced on March 27, 2007 for the offences of break and enter contrary to Section 348(1)(b) of the **Code**, as well as, a trespass at night charge contrary Section 177 of the **Code**. Both were committed on December 18, 2004 when he was about 15 ½ years old. The Youth Court sentence imposed on March 27, 2007 also contained three related convictions for theft under $5000 charges contrary to Section 334(b) of the **Criminal Code**, which were committed on October 20, 2005, February 4, 2006 and on December 2, 2006. Mr. Bowser was sentenced by the Youth Court on a consolidation of all those matters on March 27, 2007 to a period of probation for 12 months.

[32] Defence Counsel for Mr. Bowser objected to the Crown Attorney's reference to the Youth Court records of Mr. Bowser pursuant to para. 119(2)(g) of a **Youth Criminal Justice Act** (hereafter "**YCJA**"). Both counsel acknowledged that para. 119(1)(h) of the **YCJA** provides that a record that is created under the **Act** shall, upon request, be made accessible to a judge for any purpose relating to proceedings against the young person or proceedings against the person after he or she becomes an adult, in respect of offences committed or alleged to have been committed by that person, subject to the "period of access" defined in para.119(2)(g) or (h) of the **YCJA**.

[33] As a result of that dispute, the Court asked the Crown Attorney and Defence Counsel for Mr. Bowser to provide their positions on the accessibility of Mr. Bowser's Youth Court record for the purposes of this sentencing hearing. Both counsel have now had the opportunity to review the relevant provisions of the **YCJA** and they now agree on the interpretation of the provisions. Essentially, the period of access stipulated in para. 119(2)(g) of the **YCJA** is the period ending three years after the youth sentence imposed in respect of the offence has been completed if the young person was found guilty of a summary conviction offence. However, the period of access stipulated in para. 119(2)(h) of the **YCJA** is the period ending five years after the youth sentence imposed for the offence has been

completed if the young person was found guilty of an indictable offence. Pursuant to para. 119(9)(b) of the **YCJA**, if, during the period of access to a record under any of paras. 119(2)(g) to (j), young person is convicted of an offence committed when he or she is an adult, this part of the **YCJA** no longer applies to the record and the record shall be dealt with as a record of an adult.

[34] The Crown Attorney and Defence Counsel for Mr. Bowser agree that Mr. Bowser's youth sentence which was a consolidation of six offences, resulted in a 12 month probation order on March 27, 2007 would have been completed on March 27, 2008. Mr. Bowser's first conviction as an adult was committed on May 8, 2011 for the offence of possession of stolen property under $5000, contrary to Section 355(b) of the **Code** for which he was fined $200, on March 8, 2012.

[35] Therefore, if any of the offences for which Mr. Bowser was sentenced as a young person on March 27, 2007 were prosecuted by indictment, then the accessibility period for his Youth Court convictions would have run for five years from the completion date of the sentence from March 27, 2008 to March 27, 2013. Pursuant to subsection 119(9)(2)(b) of the **YCJA**. Defence Counsel conceded that if the Crown had proceeded by indictment, Mr. Bowser's youth record would be admissible for sentencing purposes on the charges now before the Court. However, if the Crown had proceeded by way of summary conviction on all of the Youth

Court charges, then the Crown Attorney would not be able to refer to those Youth Court charges, since the period of accessibility would have expired on March 27, 2011, well before the commission of the first adult offence on May 8, 2011, and, of course, well before the date of his conviction on March 8, 2012.

[36] However, it was noted that the JEIN reports attached to the PSR do not indicate whether the Crown proceeded by indictment or by way of summary conviction for the Youth Court sentence ordered on March 27, 2007. As a result, the Crown Attorney undertook to obtain the original records of those cases going back to December, 2004 in order to advise the Court whether the Crown had proceeded by indictment on some of the charges or proceeded by way of summary conviction on all of the Youth Court charges for which Mr. Bowser was sentenced on March 27, 2007.

[37] On September 16, 2016, the Crown Attorney advised the Court and Defence Counsel, that the original file information had been reviewed and it was confirmed that the Crown had proceeded by indictment on the break and enter charges which were before the Youth Court. Mr. Bowser had pled guilty to those break and enter charges on January 24, 2007 and the sentence of 12 months of probation was ordered by the Youth Court on March 27, 2007. As a result, pursuant to para. 119(2)(h) of the **YCJA**, the period of access to Mr. Bowser's Youth Court record

would have ended five years after the youth sentence was completed, that is, on March 27, 2013. However, by virtue of his conviction in Provincial Court on March 8, 2012 and the operation of Section 119(9)(2)(b) of the **YCJA**, Mr. Bowser's entire Youth Court record shall be dealt with and considered as an adult record. Therefore, I find that Mr. Bowser's entire Youth Court record was properly referenced by the Crown Attorney and will remain before the Court as an adult record for consideration in the determination of the just and appropriate sanction in this case.

[38] Mr. Ricky Cameron is 48 years old. He was raised by a single mother, since his parents divorced shortly after he was born. Mr. Cameron stated that he did not have a lot of contact with his father and that his mother had mental health and substance abuse issues. In addition, his mother had physically abused him as a child which resulted in Child Protection Services apprehending him and his sister and placing them in foster care for about six months. Mr. Cameron left his mother's residence when he was 15 years old to seek help from Community Services, but he ended up spending seven months in the Nova Scotia Hospital for treatment. After that, he returned to his mother's residence for short time, but left because she continued to be a violent towards him.

[39] Mr. Cameron has been in a five-year relationship with Ms. Tiffany McIsaac, and they had two children together. However, their son passed away four years ago when he was a baby. They have a 14-month-old daughter. Although Mr. Cameron is presently incarcerated on other matters, the couple communicate on a daily basis and his partner is very supportive of him. Mr. Cameron added that he is also the father of 11 children from relationships with 11 other women, and that he does have some contact with the older children. Ms. McIsaac also has full custody of her 12-year-old daughter with special needs.

[40] Ms. McIsaac confirmed her relationship with Mr. Cameron and said that they speak to each other almost every day. She described Mr. Cameron as being "a good person who is goodhearted" and added that Mr. Cameron gets frustrated easily as a result of his Attention Deficit Disorder and past head trauma which has affected his memory and decision-making skills. Ms. McIsaac said that Mr. Cameron faces many barriers because of his physical and mental challenges, but he is willing to work on them and make positive changes in his life.

[41] Mr. Cameron stated that he had many difficulties in school due to his Attention Deficit Disorder which contributed to his lack of focus. He told the probation officer that he has literacy issues and memory issues, as he has been the victim of head trauma which affected his cognitive learning. He also advised that

he was bullied in school and assaulted because of his race. He repeated grade seven on a couple of occasions, quit school for a period of time and then returned, ultimately completing grade nine. While incarcerated, he has completed the level I education school program, but has no future educational plans.

[42] Mr. Cameron reported that he has been unemployed for over five years, mainly because of his medical conditions. He has been diagnosed with severe arthritis and has been involved in many car accidents which affected his left side extremities. When he was eight years old, as a result of a sledding accident, he became deaf in one ear and suffered some head trauma. At age 13, he fell 40 feet onto railway tracks and suffered a concussion and memory loss. While incarcerated at the Central Nova Scotia Correctional Center in Burnside, he was the victim of the stabbing in the head and continues to experience anxiousness, stress, anxiety and paranoia. In terms of his employment, in the past, he has been employed as a security officer for several bars and clubs as well as the truck driver. In the future, he hopes to open his own snow removal business.

[43] While incarcerated in a federal penitentiary, Mr. Cameron has taken some educational programming to help better himself and has connected with Mental Health for extra support. He enjoys attending aboriginal sweats, making beadwork and necklaces that he hopes to sell at the Aboriginal Friendship Center upon his

release. The Probation Officer contacted Mr. Cameron's parole officer who did confirm that Mr. Cameron has been the victim of many assaults and had to be placed in segregation for the past month for his own protection. The parole officer also confirmed that Mr. Cameron did complete a moderate learning program when he first arrived, but did not display any improvement. It was recommended that he repeat the program. While the parole officer believes that Mr. Cameron was engaged in the process, he noted that he does face some cognitive challenges in bettering himself.

[44] The Probation Officer discussed *Gladue* factors with Mr. Cameron, who reported that his grandmother was of First Nations descent, but that he had no connections or community ties to his aboriginal roots. Mr. Cameron advised the Probation Officer that, although he identified himself as being aboriginal, he waived his right to have his individual circumstances considered, as per *Gladue*, since he had no present connections with the community.

[45] Mr. Cameron has a prior record for two convictions in relation to Section 5(2) of the **CDSA** for possession for the purpose of trafficking **CDSA** substances, for which he was sentenced to a two-year sentence in a penitentiary on July 13, 2015, for an offence committed on February 27, 2013. In addition, Mr. Cameron has three prior convictions for possession of stolen property valued at less than

$5000 contrary to Section 355(b) of the **Criminal Code**. He was sentenced to 90 days of intermittent custody on February 1, 2007 on those charges. He has also been convicted of three charges of simple possession of **CDSA** substances contrary to Section 4(1) of the **CDSA** on January 30, 2007, December 13, 2006 and also on October 25, 2005. Finally, Mr. Cameron's prior record also includes two convictions for theft under $5000 contrary to Section 334(b) of the **Code** on October 8, 1997, as well as, a conviction on October 7, 1997 for the offences of theft under and trespassing at night contrary to Section 177 of the **Criminal Code** on October 30, 1996. For the October 7, 1997 convictions, Mr. Cameron received a suspended sentence and one year on probation which included community service, while for the conviction entered the next day, he was ordered to serve three months in custody at a provincial facility.

APPLICABLE PURPOSES & PRINCIPLES SENTENCING:

[46] In all sentencing decisions, determining a fit and proper sentence is highly contextual. It is necessarily an individualized process which depends upon the circumstances of the offence and the particular circumstances of the specific offender. On this point, the Supreme Court of Canada stated, in *R. v. M.(C.A.)*, [1996] 1 SCR 500 at paras. 91 and 92, that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the

societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while at the same time taking into account the victim or victims and the needs of and the current conditions in the community.

[47] The purposes and principles of sentencing are set out in Sections 718, 718.1 and 718.2 of the **Criminal Code**. In this case, I find that the primary objectives are the denunciation of the unlawful conduct, specific deterrence of Mr. Bowser and Mr. Cameron, as well as, for the general deterrence of like-minded offenders, the protection of the public and to assist in the rehabilitation of the offenders.

[48] Parliament has also included the principal of proportionality found in Section 718.1 of the **Criminal Code** which requires the court to determine a sentence that is proportionate to the gravity of the offence and the degree of the responsibility of the offender.

[49] In Section 718.2 of the **Criminal Code**, Parliament has required the courts to consider other sentencing principles in imposing a just sanction which will contribute to respect for the law and maintenance of a just, peaceful and safe society. Pursuant to Section 718.2 (a) of the **Code**, the Court is required to increase or reduce the sentence being imposed by taking into account any relevant aggravating or mitigating circumstances relating to the offence or the offender. The

parity principle outlined in Section 718.2(b) of the **Code** requires the Court to take into account the fact that similar sentences should be imposed on similar offenders for similar offences committed in similar circumstances.

[50] Finally, the Court must also consider the totality principle found in Section 718.2(c) of the **Code** which requires the Court to consider that where consecutive sentences are imposed, that the combined sentence should not be unduly long or harsh. The principle of totality must be considered in this case, as the Court is determining the appropriate sentence for the two charges for which each one of the two offenders has been convicted.

[51] With respect to the totality principle, in *R. v. M (C.A.)*, [1996] 1 SCR 500, the Supreme Court of Canada stated, at para. 42, that the totality principle, which requires the sentencing judge who orders an offender to serve consecutive sentences for multiple offences, is to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. The Court approved Clayton

[52] In addition, I find that the principle of restraint and the impact of the order on the offender's rehabilitation should be considered in determining the just and appropriate sanction for Mr. Cameron, given his personal circumstances and also

taking into account any *Gladue* factors based upon his status as an aboriginal offender. I also find the principle of restraint should be considered in determining the appropriate sanction for Mr. Bowser, since he was youthful first time adult offender at the time of these offences, though he has since been convicted of breaches of recognizance which he has been on for almost five years. Mr. Bowser is still a relatively youthful adult offender and is facing the possibility for the first time of serving a lengthy term of imprisonment. This principle of restraint in imposing a first time sentence of imprisonment was succinctly stated by Rosenberg J.A. in *R. v. Priest*, 1996 CanLii 1381 (Ont. C.A.) at page 5:

> Even if a custodial sentence was appropriate in this case, it is a well-established principle of sentencing laid down by this Court that the first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused, rather than solely for the purpose of general deterrence.

GLADUE PRINCIPLES AND SECTION 718.2(E) CRIMINAL CODE:

[53] As I previously indicated, the Probation Officer noted in the Pre-Sentence Report noted that Mr. Cameron reported that his grandmother was of First Nations descent, but he had no current connections or community ties to his aboriginal roots. Defence Counsel for Mr. Cameron stated that he had only learned of Mr. Cameron's aboriginal heritage very recently and, when asked by the Court whether Mr. Cameron wished to have a formal *Gladue* report prepared, he advised of the

Court that Mr. Cameron did not wish to have the sentencing hearing delayed by the preparation of a formal *Gladue* report. However, Defence Counsel added that he would make some general submissions regarding Mr. Cameron's aboriginal heritage which the Court could consider for it sentencing decision.

[54] The specific wording of Section 718.2 (e) of the **Code** which states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders," requires a sentencing judge to consider alternatives to the use of imprisonment as a penal sanction. This sentencing factor is, for all intents and purposes, a principle of restraint. Except in cases in which no other sanction or combination of sanctions is appropriate to the offence(s) and the offender, imprisonment is a penal sanction of last resort: see *R. v. Gladue*, 1999 CanLii 679 (SCC) at para. 36.

[55] The specific reference to aboriginal offenders in Section 718.2 (e) of the **Code** is meant to alter the method of analysis which sentencing judges must use in determining a fit and appropriate sentence for aboriginal offenders. Section 718.2(e) is meant to be the remedial provision in recognition of the fact that aboriginal people are seriously overrepresented in the prison populations across

Canada, and also, in recognition of the reasons for which that overrepresentation occurs: see *R. v. Ipeelee*, 2012 SCC 13 at para. 59 and *Gladue*, *supra*, at para. 93.

[56] The appropriateness of a sentence depends on the particular circumstances of the offence, the offender and the community in which the offences were committed. The individualized focus in sentencing decisions creates a disparity among sentences for similar crimes: see *Gladue*, *supra*, at para. 76. As a result of that individualized focus in sentencing decisions, Watt J.A. noted in *R. v. Jacko, Cooper and Manitowabi*, 2010 ONCA 452 at para. 64 that:

> Restorative justice objectives do not trump other sentencing objectives in every case involving aboriginal offenders. Separation, denunciation and deterrence retain their fundamental relevance for some offenders who commit serious offences. As a general rule, the more serious and violent an offence, the more likely it is that the terms of imprisonment imposed on similarly-circumstanced aboriginal and non-aboriginal offenders will not differ significantly, and indeed may be the same. That said, in some instances of serious and violent crime, the length of a sentence of an aboriginal offender may be less than that imposed on a non-aboriginal offender: Gladue at paras. 79 and 80. Serious crime and the objectives of restorative justice are not incompatibles in the sentencing process-restorative justice objectives may predominate in the sentencing decision for aboriginal offenders convicted of serious crimes: *R. v Wells*, [2000] 1 SCR 207 at para. 49 and *R. v. Whiskeyjack* (2008), 93 OR (3rd) 743 (Ont.C.A.) at para. 29

[57] More recently, in *Ipeelee*, *supra*, the Supreme Court of Canada stated, at para. 59, that when sentencing an aboriginal offender, a judge must consider: (A) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the Courts; and (B) the types of sentencing procedures and sanctions which may be appropriate in the

circumstances for the offender because of his or her particular aboriginal heritage or connection: (*Gladue*, *supra*, at para. 66).

[58] In terms of the broad systemic and background factors affecting aboriginal people generally, the Court made it clear in *Ipeelee, supra*, at para. 60, that courts must take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide and of course, higher levels of incarceration for aboriginal peoples. The Court added that these matters on their own do not necessarily justify a different sentence for aboriginal offender. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the Court in every case, unless the offender expressly waives his right to that information being considered.

[59] In *Ipeelee*, *supra,* at para. 73, the Court added that the systemic and background factors may bear on the culpability of the offender to the extent that they shed light on his or her level of moral blameworthiness. Those unique systemic and background factors are mitigating in nature in that they may have played a part in the aboriginal offender's conduct. Therefore, the Court concluded

that failing to take those circumstances into account would violate the fundamental principle of sentencing-that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender [emphasis in original text].

[60] However, the Court specifically noted in *Ipeelee, supra*, at para. 75, that Section 718.2(e) does not ask the court to remedy the overrepresentation of aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of aboriginal offenders, in order to endeavor to achieve a truly fit and proper sentence in any particular case. *Gladue, supra*, is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them.

[61] The Court also observed, in *Ipeelee, supra*, at paras. 81-83, that there is no requirement for the offender to establish a causal link between background factors and the commission of the current offence before being entitled to have those factors considered by the sentencing judge. The Supreme Court of Canada recognized that it would be "extremely difficult for an aboriginal offender to ever establish a direct causal link between his circumstances and his offending" and the operation of Section 718.2 (e) does not logically require such a connection.

Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine the appropriate sentence. However, unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[62] Although there was no formal *Gladue* report prepared for the Court's consideration in determining the just and appropriate sanction for Mr. Cameron, based upon my review of the relevant issues raised in other cases where the Court had access to a *Gladue* report, it would appear from the information contained in the PSR which was provided to the Probation Officer by Mr. Cameron, that the following *Gladue* Factors were or are present:

1. Mr. Ricky Cameron's grandmother was of aboriginal descent, although he could not provide any further details to the Probation Officer about his aboriginal origins;

2. Mr. Cameron has personally experienced the adverse impact of many factors continuing to plague aboriginal communities since colonization, including:

(a) family deterioration, separation and absent parents;

(b) substance abuse in the immediate family;

(c) low income and unemployment due to lack of education;

(d) poverty and covert and overt racism in school and in prison;

(e) physical violence and abuse in the family home;

(f) family involvement in the criminal environment;

(g) loss of identity, culture and ancestral knowledge.

AGGRAVATING AND MITIGATING FACTORS:

[63] In terms of the aggravating factors which are present in this case and apply equally to Mr. Bowser and Mr. Cameron:

1. The offences before the Court cannot be regarded as impulsive actions. These offences required a significant amount of planning and deliberation on the part of Mr. Bowser and Mr. Cameron and at least, one other unidentified male.

2. There was a significant loss of valuable personal property, estimated to be an amount of $38,000, which was obviously not recovered by the police for the rightful owners;

3. There was a high degree of planning and deliberation in coordinating and carrying out stripping of the copper wire which had to involve Mr. Bowser, Mr. Cameron and other unidentified individuals during the early morning hours of October 24, 2011 in order for Mr. Cameron to make a delivery of copper wire to Dartmouth Metals by himself, before 8:00 AM on October 24, 2011. And then, for Mr. Cameron to make two other deliveries with Mr. Bowser and another unidentified male at 9:15 AM and 10:14 AM, which involved a total of over 3150 pounds of copper wire being delivered to Dartmouth Metals on Monday, October, 24, 2011;

4. The offences in question were purely profit-oriented crimes;

5. Mr. Bowser has a previous related record, predominantly as a young offender, for two break and enter convictions into dwelling houses, three theft under $5000 convictions and one adult conviction for possession of stolen property under $5000. Mr. Cameron also has a prior related record for three prior convictions of possession of stolen property under $5000 as well as two prior convictions for theft under $5000. Mr. Cameron is currently serving a two-year federal sentence

for a section 5(2) **CDSA** conviction for the possession of a substance for the purpose of trafficking, imposed on July 13, 2015;

[64] In addition, the following aggravating factors apply only in the case of Mr. Bowser:

1. Mr. Bowser has a record for five convictions of failure to comply with the condition in his recognizance contrary to Section 145(3) of the **Criminal Code** for which he has served intermittent sentences of imprisonment with the duration of 25 days, 30 days and 90 days;

2. Mr. Bowser brought the stolen property from Mather's Freight into the residence, where he lived with his partner, Latisha Bowser, and two other members of his family, to strip the metal, PVC and rubber sheathing off the copper wire to get it ready for delivery to Dartmouth Metals.

[65] In terms of mitigating factors present in this case:

1. During the sentencing hearing, Mr. Cameron and Mr. Bowser expressed their remorse for having been involved in the offences before the Court and accepted responsibility for them;

2. Since October 27, 2011, Mr. Bowser has been subject to the conditions of a recognizance with the surety, which included house arrest subject to several exceptions, which were varied or otherwise considered by the Court on well over 30 occasions. However, there have been breaches of that recognizance which have resulted in Mr. Bowser serving the periods of intermittent custody referred to above. For his part, Mr. Cameron was released on the terms of recognizance with the surety which contained a curfew condition on November 1, 2011 and he complied with those conditions without any breaches until he was ordered to serve the two-year federal sentence for the **CDSA** possession for the purpose of trafficking offence;

3. The PSR's prepared for Mr. Bowser and Mr. Cameron do have some positive aspects in them: they are in long-term relationships, have the support of their partners, and in the case of Mr. Bowser, he is very involved in the full-time care of his children;

4. Approximately three and a half years ago, Mr. Bowser became self-employed operating his own business with his father doing janitorial services, moving and other general labor jobs.

ANALYSIS:

[66] As is evident from the sentencing submissions made by the Crown Attorney and Defence Counsel for Mr. Bowser and Mr. Cameron, there is a significant difference between a four year sentence to be served in the penitentiary recommended by the Crown and the sentence recommended by Defence Counsel for Mr. Bowser of two years to be served in the community under the terms of a Conditional Sentence Order (CSO) and the sentence recommended by Defence Counsel for Mr. Cameron of six to nine months of custody. In their submissions, the Crown Attorney and both Defence Counsel have recognized that denunciation of the unlawful conduct, specific and general deterrence are the primary purposes of sentencing at play in this case, but Defence Counsel also place an equal focus on restraint and ordering an appropriate sentence which would assist the rehabilitation of both their clients, but in particular, Mr. Bowser.

[67] The Crown Attorney points out that Parliament has assessed the objective gravity of the offence of a break, entry and commission of an indictable offence, in this case, theft, from a place other than a dwelling house contrary to Section 348(1)(e) of the **Criminal Code**, prosecuted by indictment, as being relatively high. An offender who is found guilty of this offence could be liable a period of imprisonment not exceeding ten years. Parliament has assessed same objective

gravity for the indictable offence of possession of stolen property of a value over $5000. As mentioned previously in relation to this offence, Mr. Bowser and Mr. Cameron are each liable to imprisonment for a term not exceeding 10 years pursuant to Section 355(a) of the **Criminal Code**. There is, however, no mandatory minimum sentence imposed for either one of those offences.

[68] Looking at the various charges before the Court, there is no question that in applying the proportionality principle found in Section 718.1 of the **Code**. Mr. Bowser is before the court to be sentenced, after being convicted following a trial, of two very serious charges prosecuted by indictment, that is, the charges of break, enter and theft of the business premises of Mather's Freight, a place other than a dwelling house, contrary to Section 348(1)(e) of the **Criminal Code** and possession of stolen property of a value over $5000. Given the amount of planning and premeditation as well as the profit motive for those offences, I find that Mr. Bowser's degree of responsibility for both of those charges is very high. Similarly, I find that Mr. Cameron's degree of responsibility is equally very high, as it was reasonable to infer from all of the direct evidence and circumstantial evidence that he must have participated actively after the welding leads and copper wire were stolen from Mather's Freight in the stripping of that copper wire and welding leads, sometime after eleven o'clock on Sunday, October 23, 2011, in order have to

over 3100 pounds of bare copper wire possessed jointly by him and Mr. Bowser and then delivered to Dartmouth Metals for sale, between 7:45 AM and 10:30 AM on Monday, October 24, 2011.

[69] During their submissions, counsel noted that the Court would be required to consider the "parity principle" found in Section 718.2(b) of the **Criminal Code**, and in imposing an appropriate sentence on the two offenders, to keep in mind that the sentence to be imposed on each of them should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. For that reason, the Crown Attorney and both Defence Counsel referred to several cases to assist the court in establishing an appropriate range of sentence for the offences and the individual offenders who are before the court for sentencing.

[70] With respect to the cases cited by counsel, I simply note here that given the highly individualized nature of the sentencing hearing which focuses on the circumstances of the offences and the circumstances of the individual offender, it is often difficult to find that similar offender who has committed similar offences in similar circumstances. Oftentimes, the reference to other cases in considering the "parity principle" is somewhat frustrating, since there are always distinguishing features in either the offence or the offender, but comparisons to other cases may

be very helpful in establishing upper and lower ends of a range of sentences for similar offenders who have committed similar offences in similar circumstances.

[71] During his submissions, the Crown Attorney referred to *R. v. Zong*, [1986] NSJ No. 207 (Nova Scotia Court of Appeal) which involved an early guilty plea to break and enter into a pharmacy. The offender was found in the pharmacy with an ax, a metal wedge, a crowbar and gloves while under the influence of alcohol. The offender was 54 years old and had a long record of criminal convictions, having spent about 33 years of his life in prison. The Court of Appeal increased an order of 18 months of custody plus three years of probation to three years imprisonment and mentioned that the three year sentence for this offence "is a benchmark from which a trial judge should move as the circumstances in the judgment of the trial judge warrant."

[72] In *R. v. McAllister*, 2008 NSCA 103 which also established a three-year "benchmark" or "starting point" for a break, enter and theft involving commercial premises. In that case, the offender and another person broke into the Amherst Justice Center to obtain cash and cheques from the safe. The offender was a youthful adult offender, who had a "horrendous" Youth Court record, which included seven prior break enter and theft charges which between one to four years before this offence, his first offence as an adult. The trial judge noted that there

were no mitigating factors other than the fact that this was the offender's first adult offence. The Nova Scotia Court of Appeal also noted that the appropriate sentence may be one that moves up or down from that "benchmark" or "starting point" depending upon the circumstances of the offence, the particular offender and any aggravating or mitigating factors.

[73] In *R. v. Adams,* 2010 NSCA 42, the Court reaffirmed the three year "benchmark" for a break and enter offence and also stated that it is a sliding scale which may descend to a two-year level in cases involving individuals who do not have prior records. In the *Adams*, *supra*, case, there were two counts of break, enter and theft from business premises, eight counts of possession of stolen goods and one count of counseling perjury. The value of the goods stolen, over a three-year period, was about $690,000. The offender was a successful businessman with a high income who pled guilty to certain offences after many days of trial. Although the offender was not youthful, he had no prior criminal record, but the offences were regarded as an ongoing, long-term, planned and targeted criminal activity. He resided with his wife and their son in a mortgage-free home, had no health or substance abuse issues, so there was no explanation for his crimes apart from the obvious profit motive. The court regarded the offender's moral culpability as being "significant." Given the number of charges involved, the principle of totality was

engaged as the Court ordered five to six years on the first break, enter and theft, plus an additional two years on the second break and enter charge. Looking at the totality of the sentence, the Court of Appeal ordered two years concurrent for all eight counts of the possession of stolen property charges. In the final analysis, after taking into account the principle of totality, the Court of Appeal increased the total sentence from 42 months to 96 months imprisonment before remand credit.

[74] The Crown Attorney and Defence Counsel for Mr. Bowser also referred to numerous other break, enter and theft cases, which involved a break, entry and commission of an indictable offence in an occupied residence or a seasonal dwelling house as opposed to a commercial premises. However, they also cited the following cases which involved a break, enter and theft of a commercial premises:

1. *R. v. Hemlow*, [1990] N.S.J. No. 171 (NSSC-Appeal Division) - the accused pled guilty to the charge and the appeal court upheld the trial judge's three-year sentence of imprisonment for a break enter and theft of a commercial establishment. There were no details with respect to the circumstances of the offender;

2. *R. v. Johnson*, [1991] N.S.J. No. 438 (NSCA) - the offender was found guilty following the trial of stealing two guitars, after breaking a window at a music shop. A trail of blood led to the premises of the

appellant and the trial judge rejected the accused's claim that he cut his arm in a fight. The guitars were located near his doorstep. The offender was a 33 years old with an extensive criminal record and was sentenced to 42 months of imprisonment;

3. *R. v Downey*, [1994] N.S.J. No. 552 (NSCA) - the offender pled guilty to a break, enter and theft from a commercial premises, while he was on parole and received a three year sentence. The offender was 36 years old living in a common-law relationship, the presentence report contained both positive and negative features, but he had a lengthy prior and related criminal record. The trial judge ordered a sentence of three years consecutive to the sentence that he was serving, after taking into account the totality principle and that sentence was upheld by the Court of Appeal;

4. *R. v. McKay*, [1993] N.S.J. No. 250 (NSCA) - the offender and two accomplices broke into and entered meat market, loaded meats and other products in garbage bags and then removed the stolen goods from the premises. The value of the meat was estimated at $960. Some of the stolen product was later recovered. The offender claimed that he and his accomplices needed the stolen goods for food. He

entered a guilty plea to the charge of break, enter and theft from a commercial premises. At the time of the offence, the offender was 22 years old, living in a common-law relationship and was the father of four children. Five years earlier in Youth Court, he was found responsible on six charges of break enter and theft for which he was sentenced to serve 24 months in open custody. The Court of Appeal considered the Youth Court dispositions and concluded based on *R. v. Zong*, *supra*, that the three year benchmark should move as the circumstances warrant and that in this case, the two-year sentence imposed by the trial judge was upheld by the Court of Appeal;

5. *R. v. DeWolfe*, 2016 NSSC 14: the offender entered guilty pleas to two charges of break, enter and theft as well as two counts of possession of a controlled substance methadone and hydromorphone. The offender broke into the pharmacy by smashing a window, stealing drugs and cash. A police dog led police to a nearby apartment where the offender was found. There, the police located and seized the drugs and marked bills that had been taken from the pharmacy. Mr. DeWolfe admitted to being the person who committed a prior break-in at that pharmacy as well as the more recent break-in and possession of

the drugs. His motive was to sustain his drug habit. While in custody, Mr. DeWolfe participated in a treatment program and accepted responsibility for his offences. Mr. DeWolfe was 37 years old with 25 prior convictions. He obtained his grade 12 level through adult education. He was estranged from his wife and their child and had been on social assistance for several years. He had a history of struggling with addiction to prescription medication. Looking at totality, the court ordered three years in custody on the first break and enter conviction and two years consecutive on the second break and enter conviction, less the remand credit of 465 days. The possession of **CDSA** substances resulted in concurrent sentences.

6. *R. v. Bursey*, 1991 CanLii 2576 (NSCA): The Crown appealed the trial judge's order of a suspended sentence and two years of probation for a break, enter and theft charge of the business premises. The offender was 20 years old at the time of the offence and had entered an early guilty plea to the charge contrary to Section 348(1)(b) of the **Code**. The offender and two accomplices broke into a clothing store and took merchandise valued at between $3000 and $4000. Some of the merchandise was recovered. One of his accomplices was

sentenced to two years of incarceration, while the other was given a suspended sentence. The Court of Appeal reiterated that the three-year imprisonment for a break, enter and theft was the benchmark, but that all cases must be dealt with on an individual basis and stated that there was "no similarity at all between the facts before us and those in *Zong*." In upholding the trial judge's sentence, the Court of Appeal held that there were "a number of unique aspects" and "unique circumstances" which included a troubled childhood and adolescence, being incarcerated at the children's school for boys, continuous problems with drugs and alcohol from age 11 to the commission of the offence as well as prior convictions for property offences including, a break enter and theft. Since the offences, the offender had stayed away from his former associates, refrained from alcohol and drugs, was engaged to be married, attended counseling and treatment programs and had found work. There were positive work references, letters of recommendation from others and the offender was remorseful, having written a letter of apology to the business. In addition, the offender offered to pay for the damage done to the

> building and make restitution for the missing items and he had taken out a loan to do so.

[75] In terms of the parity principle as it applies to Mr. Cameron, the Crown Attorney did not refer to any particular cases. However, in also recommending a sentence in the range of four years for Mr. Cameron, Defence Counsel for Mr. Cameron noted that the Crown Attorney was essentially recommending a sentence for the break, enter and theft as well as the possession of stolen property, when Mr. Cameron has neither been charged with, nor convicted of the break, entry and theft of property from Mather's Freight.

[76] Defence Counsel for Mr. Cameron indicated that in the few reported cases he could locate, the sentence for the possession of stolen property was usually a short consecutive sentence to the other substantive charges or was a concurrent sentence to the other charges. In *R. v. Brown*, 2010 NSPC 38, Judge Derrick sentenced the offender, following a guilty plea, to one year in custody for possession of stolen property valued at over $5000 in relation to his several charges of operating an automobile "chop shop" which dissembled vehicles and then sold the parts. There was no evidence that Mr. Brown himself had stolen any of the vehicles, but the assessed total value of the vehicles in his units and lots was around $400,000. Mr. Brown was 35 years old, with two dated convictions for a

drug offence and mischief. He was a father of five children, worked for his father's demolition company and operated his own motor vehicle repairs. He admitted that he had fallen in with people involved in illegal activities and he accepted responsibility for his actions. The Crown had sought a sentence in the range of two and four years imprisonment based on the relationship between the "chop shop", the number of victims, the number and value of the vehicles involved and the planned and deliberate nature of the offence. Defence Counsel had sought a conditional sentence of less than two years.

AVAILABILITY OF CONDITIONAL SENTENCE ORDER:

[77] **The Safe Streets and Communities Act** (S.C. 2012, c.1, s. 34), which came into force on November 20, 2012, amended Section 742.1 of the **Criminal Code** dealing with the imposition of a Conditional Sentence Order (hereafter "CSO"). Since the break, enter and theft occurred in October of 2011, the Court must take into consideration that a CSO of a term of imprisonment served in the community is an "available" option. Thereafter, whether it is the "appropriate" order to be granted in the circumstances of this case, is to be determined by the legislation which existed at that time.

[78] In October, 2011, Section 742.1 of the **Criminal Code**, a CSO was not an available sentencing option for the sentencing judge, where, for example, Parliament created statutory bars such as being convicted of a "serious personal injury offence" as defined in Section 752 or being convicted of an offence punishable by a minimum term of imprisonment. None of those statutory bars contained in Section 742.1 of the **Code** are applicable in the circumstances of the offences before the Court. However, the legislation also required the Court to consider one additional criterion to determine whether a CSO remained as an "available" sanction. In that regard, a CSO would only remain an "available" sanction if the Court was to conclude that the sentence of imprisonment to be imposed would be less than two years. In other words, if the sentence to be ordered would result in a federal term of incarceration, then the option of serving the sentence as a CSO in the community was no longer an "available" option for the court to consider.

[79] If the Court concluded that the just sanction was a sentence of less than two years of imprisonment and a CSO of imprisonment in the community was still an "available" sanction, then Section 742.1 of the **Criminal Code** as it stood in October, 2011, also required the Court to determine whether the CSO was an "appropriate" sanction by considering two additional factors:

(a) Whether the service of the sentence of imprisonment in the community would not endanger the safety of the community; AND

(b) Whether the service of the sentence in the community would be consistent with fundamental purpose and principles of sentencing in Sections 718-718.2 of the **Criminal Code**.

THE JUST AND APPROPRIATE SANCTIONS:

[80] In this case, considering that final factor of whether a CSO is an "available" sanction, I have to determine whether the appropriate sentence of imprisonment for Mr. Bowser would be less than two years. Looking at the parity principle, I find that that the Nova Scotia Court of Appeal has established a "benchmark" or "starting point" of three years in prison for the offence of break, enter and theft, for dwelling houses, and, also buildings other than dwelling houses such as commercial establishments. However, as the Court of Appeal has noted, a "benchmark" or "starting point" may be increased or reduced by trial courts and upheld on appeal, in cases which have some relatively "unique aspects" or "unique circumstances" or there are several mitigating factors which could be taken into account to reduce the sentence imposed, or the presence of several aggravating factors which might tend to increase the sentence to be imposed.

[81] Furthermore, in determining the appropriate sentence today, I find that the Court has to take into account the significant value of the property taken from Mather's Freight management, the prevalence of this type of offence in the community, the relative vulnerability of the businesses or residences that are victimized by people who steal copper wire for sale for its salvage value and the fact that none of the property was recovered. With respect to this last point, this is particularly relevant to the possession of stolen property charge as I have found that Mr. Bowser, Mr. Cameron and other unidentified individuals who were in possession of approximately $38,000 of stolen property, quickly converted it for their own financial gain by stripping the welding leads and cables of the metal, PVC and rubber coating off the copper wire. As a result, within hours of the break-in, entry and theft from Mather's Freight, I found that Mr. Bowser, Mr. Cameron and probably other unidentified people, converted the stolen property into 3150 pounds of bare copper wire which was sold to Dartmouth Metals for a pure profit motivation to obtain over $8000. In those circumstances, it was impossible to recover and return the stolen property to its rightful owners.

[82] As indicated previously, Mr. Bowser has been found guilty of two very serious offences prosecuted by indictment, for which he is liable to a maximum term of imprisonment of not more than ten years. Mr. Cameron has been jointly

found guilty of one very serious offence, that is, the possession of property obtained by crime of a value of over $5000 prosecuted by indictment, and as such, he is also liable to a maximum term of imprisonment of not exceeding ten years. In those circumstances, I find that the gravity of these offences is quite high. Given the high degree of planning, premeditation and deliberation, as well as the pure profit motive for their actions and other very significant aggravating factors, as well as, the fact that there are relatively few mitigating factors present in this case with respect to both offenders, I also find that both Mr. Bowser's and Mr. Cameron's degree of responsibility is very high. Therefore, looking at the principal of proportionality found in Section 718.1 of the **Criminal Code**, I find that the moral culpability of both offenders is also very high.

[83] Furthermore, looking at the parity principle found in Section 718.2(b) of the **Criminal Code**, I find that the appropriate range of sentence for the break, enter and theft charge for which Mr. Bowser was convicted following a trial, taking into account the Nova Scotia Court of Appeal's clear direction with respect to the "starting point", would be between a two and a half year sentence in a federal institution where there were significant mitigating factors and relatively few aggravating factors as in *McKay* (1993 NSCA) to a sentence of three to four years in a federal institution based on *Adams* (2010 NSCA) which involved a first time

offender who was not youthful, had a stable family relationship, with a neutral pre-sentence report and some mitigating factors, but with several aggravating factors including significant planning and premeditation.

[84] I find that the *Bursey* (1991 NSCA) case, referred to by Defence Counsel for Mr. Bowser, does not reflect a similar offender who has committed similar offences in similar circumstances. In fact in *Bursey, supra*, the Court of Appeal noted that one of the offender's youthful accomplices was sentenced to two years of incarceration in a federal penitentiary which would have obviously been based upon a significant difference in the role played by that offender and by Mr. Bursey. I find that the *Bursey, supra*, case had several "unique circumstances" and given the disparity in the sentences between the three offenders, it would appear that Mr. Bursey had a more limited role and as a result, the trial judge determined that he had lower moral culpability than the other offenders. Given the number of aggravating factors present in this case, and what I regard as a very significant moral culpability on the part of Mr. Bowser, I find that the *Bursey, supra*, case can be distinguished as I do not regard it as a similar offence which was committed by similar offender in similar circumstances.

[85] After having considered the relevant purposes and principles of sentencing, I find that the just and appropriate sanction for Mr. Bowser's conviction for the

break, enter and theft charge, should result in a federal sentence of imprisonment close to the three year "benchmark" or "starting point" which has been reaffirmed on numerous occasions by the Court of Appeal. In those circumstances, I therefore conclude that a CSO is not an "available" sanction for the Court to order in respect of Mr. Bowser's conviction for the break, enter and theft charge, since I find that the just and appropriate sanction is a sentence of more than two years in prison.

[86] In terms of Mr. Bowser's sentence for the break, enter and theft charge of a commercial premises contrary to Section 348(1)(b) of the **Criminal Code**, after having considered the proportionality principle as well as the parity principle and both the significant aggravating factors and the relative absence of mitigating factors, I find that the just and appropriate sanction for that offence is to order Mr. Bowser to serve a term of 30 months of imprisonment in a federal penitentiary. I conclude that, while I have found that there were significant aggravating factors including his prior related record for the same offence, I am also taking into account, as a significant mitigating factor in imposing this sentence, the period of approximately four and a half years during which Mr. Bowser was subject to restrictive terms and conditions of a Recognizance, which included remaining on house arrest subject to several exceptions which were varied by the Court on numerous occasions. In coming to the conclusion that a 30 month sentence of

imprisonment is the just and appropriate sanction for Mr. Bowser's key role in the break, enter and theft offence, I have also kept in mind that the primary purpose and principles of sentencing at play in this decision are specific and general deterrence as well as denunciation of his unlawful conduct. In addition, I have kept in mind the principle of restraint and his prospects for rehabilitation in reaching that conclusion.

[87] With respect to the sentence to be imposed on Mr. Bowser for the conviction following a trial for the charge of possession of stolen property contrary to Section 355(a) of the **Criminal Code**, as indicated in the trial decision, I found that this conviction is not subject to the *Keinapple* principle since there were a number of distinguishing essential elements between the two offences. Although there was a factual nexus between the two charges, I found that the same act did not ground each of those two charges.

[88] In terms of the just and appropriate sanction for that offence, I find that the Court must consider the aggravating factors of the significant value of the products stolen from Mather's Freight Management by Mr. Bowser and the significant degree of planning and premeditation in converting the stolen products into over 3100 pounds of high-grade copper wire which resulted in over $8000 being paid to Mr. Bowser and Mr. Cameron when that copper wire was sold to Dartmouth

Metals. Moreover, I have found that Mr. Bowser's possession of the stolen property did not arise in circumstances where he was acting as an "fence" to sell the stolen property or as the person who bought a stolen item from someone for a price that seemed too good to be true, based on willful blindness. Rather, I have found that he was a principal player in planning the break-in, entry and theft and bringing the stolen property to his residence, and then converting the stolen property into bare copper wire for sale to a metal recycler. Therefore, I find that his role in the possession of stolen property charge is quite different than the offender in *R. v. Brown, supra,* where Judge Derrick found that there was no evidence that the owner of the "chop shop" who possessed the stolen vehicles, had been involved in the actual theft of those vehicles.

[89] In the circumstances of this case, however, I have found that Mr. Bowser and Mr. Cameron were able to remove the metal sheathing or PVC coating off thousands of pounds of welding leads and braided or jacketed copper wire within hours of the break-in, entry and theft from Mather's Freight Management in order to be able to deliver about 3100 pounds of bare copper wire to Dartmouth Metals by 10:00 AM on October 24, 2011. In those circumstances, I find that the gravity of the offence and both offenders' degree of responsibility is very high for this offence. Having come to those conclusions, I find that the moral culpability of both

Mr. Bowser and Mr. Cameron is very high with respect to their conviction for the joint charge of possession of stolen property.

[90] In terms of their prior records, I find that both Mr. Bowser and Mr. Cameron have been convicted of related property offences and that those prior convictions are to be considered as aggravating factors in determining the just and appropriate sanction for the offence of possessing stolen property. As indicated previously, Mr. Bowser has been convicted of a relatively minor possession of stolen property charge as an adult and of course, he has the related convictions for property offences including break, enter and theft charges as well as three theft charges while he was a young person under the **YCJA** which will now form part of his adult record. As for Mr. Cameron, and he also has a related record for property offences including three prior convictions for possession of stolen property in 2007 and two theft under convictions in 1997.

[91] As the Nova Scotia Court of Appeal noted in *Adams, supra*, at para. 63, "there is little case law on the appropriate range of sentence for this crime" referring to the possession of stolen property. Given the value of the property involved in *Adams, supra*, the lengthy period of time of almost three years during which there were break-ins and possession of stolen property, the aggravating features that the stolen property was recovered from his home, his parent's home

and his brother's home as well as his business properties, the Court of Appeal held, at para. 64, that the trial judge's sentence of concurrent 12 month sentences for the eight counts of possession of stolen property were "manifestly unfit failing to properly emphasize deterrence and denunciation." In that case, the Court of Appeal ordered two years concurrent for all eight counts, taking into account the principle of totality.

[92] In terms of the just and appropriate sanction for the possession of stolen property charge for which Mr. Bowser and Mr. Cameron were jointly charged and convicted, following trial, I find that there is significant moral culpability for their actions, the value of the property possessed as a result of committing the offence of theft was very significant, in the range of $38,000, for which they received over $8000. There is no doubt that this offence involved planning and premeditation as well as a significant amount of effort following the very recent break-in, entry and theft to strip the welding leads and sheathing off the copper wire, within hours of the break-in. Although both offenders have prior records for related property offences, for both of them there was a relatively significant gap between the current offences and their prior related convictions. However, given the significance of several aggravating factors and the relative absence of mitigating

factors for both, I find that the appropriate sentence to be ordered for the possession of stolen property is one year in prison.

[93] In the case of Mr. Bowser, I hereby order that the one year in prison is to be served concurrently with the sentence ordered for the break, enter and theft charge as there was a relatively close factual nexus between the two charges for which Mr. Bowser is being sentenced. While I have found that the essential elements are different between the two offences, it is fair to say that the continuation of the theft occurred after the break and enter at Mather's Freight Management when Mr. Bowser and other unidentified individuals undoubtedly worked feverishly in his house, to get the copper wire ready for the delivery on the morning of October 24, 2011. As I have indicated previously, I find that the *Keinapple* principle does not apply, however, in looking at the principle of totality, I find that a total sentence of two and a half years (or 30 months) for Mr. Bowser is just and appropriate in all the circumstances of this case. Furthermore, I find that a one year concurrent sentence for this charge takes into account the fact that, if I was to order that the possession of stolen property be served on a consecutive basis, it would result in a combined sentence that would be unduly long or harsh, given the personal circumstances of Mr. Bowser and his prospects for a successful rehabilitation.

[94] With respect to Mr. Cameron, he has been convicted, following trial, of the joint charge of possession of stolen property with Mr. Bowser and also a separate theft charge. As I indicated previously, I found that Mr. Cameron's moral culpability for these offences is very high given the significant degree of planning and premeditation involved, the high value of the stolen property, the recent nature of his possession relative to the time when the break-in, entry and theft probably occurred. In addition, there is no doubt, that Mr. Cameron was one of the people who was at Dartmouth Metals early on the morning of Monday, October 24, 2011 with a significant volume of bare copper wire, which obviously involved significant efforts to convert the stolen property, within hours of the break-in, entry and theft, in order to dispose of the stolen property by selling it as scrap high-grade copper wire. Given that close factual nexus and the principle of parity, I find that the just and appropriate sanction for Mr. Cameron's offences of theft and the possession of stolen property, is to order the same one year term of imprisonment that I have ordered for Mr. Bowser's role in the possession of stolen property. Given the close factual nexus between the theft charge and the possession of stolen property charge for which Mr. Cameron was convicted, following a trial, I find that the one year sentence for the possession of stolen property should be served concurrently with the theft charge after having considered the totality of the

sentences to ensure that the sentence is not unduly long or harsh. However, since Mr. Cameron is presently serving a two-year sentence in a federal penitentiary for **CDSA** charges, although the two charges for which Mr. Cameron was convicted following trial, shall be served concurrently with each other, the one year sentence for those two charges shall be served consecutively to the charges for which Mr. Cameron is presently serving two years in a federal penitentiary.

[95] Furthermore, in coming to the conclusion that Mr. Cameron serve the one year sentence imposed on each of the two charges concurrently, but consecutive to the sentence he is presently serving, I have taken into account the principles of proportionality, totality and as well as a consideration of the *Gladue* factors which Mr. Cameron has personally experienced. While I have concluded that a sentence of imprisonment is a just and appropriate sanction, given the *Gladue* factors, the sentence should not be unduly long or harsh, given his prospects for rehabilitation, considering the fact that he has been able to reconnect with his aboriginal heritage while in custody and has plans to continue that positive work upon his release from penitentiary.

[96] The Crown did not seek any ancillary orders with respect to either offender and there was no claim being advanced for restitution. Since each of them have been convicted of two indictable offences, each offender is required to pay would

be a total of $400 on account of the surcharge for victims. Given the fact that the date of offences pre-date the change to the mandatory nature of the victim surcharge and considering the federal sentences I have ordered for Mr. Bowser and the consecutive sentence to the federal sentence that I have ordered for Mr. Cameron, I find it would be an undue hardship in those circumstances to also order them to have to pay a surcharge for victims. I hereby waive the imposition of the victim fine surcharge with respect to both Mr. Bowser and Mr. Cameron.

Theodore Tax, JPC