PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Mckay, 2013 NSPC 119

Date: 20131106
Docket:2314956,2402852,2414633,2424381,2401610,2423931,2426103,2566515, 2566519,2468881
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Devon Matthew Mckay

Editorial Notice

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

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated December 16, 2013.

Judge: The Honourable Judge Theodore K. Tax, J.P.C.

Oral Decision: November 6, 2013

Charges: Please see Appendix "A"

Counsel: Janine Kidd, for the Crown
Alfred Seaman, for the Defence

By The Court (Orally):

INTRODUCTION:

[1] Devon McKay has entered guilty pleas to ten (10) offences which were committed on several different dates between March 27, 2011 and February 26, 2013. The issue before the court is to determine a fit and appropriate sentence in the circumstances of this consolidation of 10 offences for this particular offender and the circumstances of the offences for which he has entered guilty pleas.

POSITIONS OF THE PARTIES:

[2] It is the position of the Crown Attorney that a fit and appropriate sentence for each of the 10 separate charges, taking into account all the purposes and principles of sentencing at play in the circumstances of this case would result in a total global sentence in the range of four years in custody less credit for pretrial custody. The Crown Attorney submits that the most serious of the charges for which Mr. McKay has entered guilty pleas were the charges of committing a robbery contrary to section 344 of the **Criminal Code** on February 2, 2012 and the break enter and theft of a business premises contrary to section 348(1)(b) of the **Criminal Code** on February 26, 2013.

[3] In addition, the Crown seeks stand-alone restitution orders under section 738 of the **Criminal Code** for the mischief charge which occurred on March 27, 2011 as well as the damage to the business premises which was occasioned during the break and enter and theft charge which occurred on February 26, 2013. The Crown also seeks an order that Mr. McKay provide a sample of his DNA as a result of the robbery charge which is a primary designated offence for the purposes of obtaining samples of DNA pursuant to section 487.051 of **Criminal Code** and a section 109 **Criminal Code** mandatory 10 year firearms order. The Defence does not oppose these applications.

[4] Defence Counsel submits that Mr. McKay has been held in custody since February 26, 2013 to the date of these submissions on September 9, 2013 which amounts to a total of 196 days. Based on **R. v. Carvery,** 2012 NSCA 107, it is the position of the Defence that, pursuant to section 719.3 of the **Code**, Mr. McKay should receive an enhanced credit for presentence custody of 1.5 days for each day served from February 26, 2013. If that total amount of

time was not granted on the enhanced credit for pretrial custody, Defence counsel submits that the enhanced credit should extend from June 2, 2013 to today's date since Mr. McKay was prepared to deal with these matters on that date, but due to other cases being scheduled by the court, there was insufficient time to make these submissions on that day. The Crown Attorney does not oppose that enhanced credit for pretrial custody of 1 ½ days for each day served from June 25, 2013 to today's date.

[5] It is the position of the Defence that Mr. McKay is a youthful adult offender with no prior adult convictions or youth court dispositions, and as such, his pre-sentence custody represents a sufficient period of time in custody for the charges of robbery and break enter and theft. For the balance of the charges, the Defence position is that the fit and appropriate disposition for all of those charges would be a suspended sentence with a lengthy period of time under terms probation or under terms of a Conditional Sentence Order ("CSO") of imprisonment in the community.

[6] In the alternative, Defence counsel submits that the court should rely upon several cases from other jurisdictions in which courts have determined that robberies may occur in many different circumstances. Furthermore, counsel submits that, in the circumstances of this case, the court ought not to conclude that the robbery was a "serious personal injury offence" under section 752 of the **Criminal Code**, so that a CSO of imprisonment would still be an available sanction. If the court concurred with that submission, then, it is the position of the Defence that all of the presentence custody, including any period of time where there would be enhanced presentence custody on a 1 ½ day to one day basis, could be credited towards the break and enter charge, so that Mr. McKay would be in a time served situation for that charge. In that event, a CSO followed by probation would be the fit and appropriate disposition for all of the other charges.

CIRCUMSTANCES OF THE OFFENCES:

[7] As I indicated at the outset, Mr. McKay comes before the court today for the determination of a fit and appropriate sentence on a consolidation of 10 charges which occurred between March 27, 2011 and February 26, 2013. Briefly stated, the facts and circumstances of the charges for which Mr. McKay has entered guilty pleas are as follows:

1) **Mischief Charge - section 430(4) Criminal Code - March 27, 2011**. On that date, around 10:30 PM, Mr. McKay was staying at the residence of Ms. Tyla Robb, in Eastern Passage, Nova Scotia and had just returned from a party. Mr. McKay was a friend of Ms. Robb's son. Ms. Robb confronted Mr. McKay about paying some rent for living at her house. There was an argument which became heated and physical and, at a certain point, Mr. McKay left the house and as he walked down the driveway, he used his elbow to smash the driver's side window of Mr. Scott Perkins' car which was parked there. Mr. Perkins was Ms. Robb's boyfriend at that time. Damage to the vehicle was $821.04. Mr. Perkins requests restitution.

2) **Theft under Charge - section 334(b) Criminal Code - December 7, 2011**- On that date, at about 4 PM, a loss prevention officer observed Mr. McKay enter the Atlantic Superstore located at 3601 Joseph Howe Dr. in Halifax. Mr. McKay took 4 Play Station III games and one other game plus a digital photo frame from the electronic section of the Superstore. He placed those items in a plastic bag and walked out the store without any attempt to pay for them. When an alarm went off, Mr. McKay was stopped outside the store by the loss prevention officer and the property valued at $459.93 was recovered.

3) **Failure to appear on Appearance Notice - section 145(5) Code - January 16, 2012** - Mr. McKay was given an appearance notice on the theft charge from December 7, 2011 to make of his first appearance in Halifax Provincial Court on January 16, 2012. He failed to appear as he was required to do on that date.

4) **Failure to appear on Recognizance - section 145(2)(a) Code - May 28, 2012**- Mr. McKay was then released from custody on a Recognizance on April 18, 2012 with respect to the theft charge from December 7, 2011. Pursuant to that Recognizance he was required to attend court on May28, 2012 and he failed to appear as required.

5) **Theft under Charge - section 334(b) Code - December 13, 2011** On this date, loss prevention officers at the Shoppers Drug Mart located at 118 Wyse Rd, in Dartmouth, Nova Scotia, observed Mr. McKay take about 20 Nintendo Wii games, put them under his arm and run out of the store, without any attempt to pay for those items. Loss prevention officers pursued Mr. McKay outside the store and the police were called to the Shoppers Drug Mart. Mr. McKay was detained by the loss prevention

officer and at that time some of the video games were recovered, but others had been dropped along the way and were not recovered. It is estimated that videogames with a value of $360 were not recovered on Mr. McKay's arrest.

6) **Failure to appear on Appearance Notice - section 145(5) Code - January 24, 2012** - Mr. McKay was released on an Appearance Notice with respect to the Theft charge from December 13, 2011 and he was required to attend court on January 24, 2012. Mr. McKay failed to attend court as he was required to do on that date.

7) **Assault charge - section 266(b) Code - January 7, 2012** - Around 8:00 PM on that date, A. J. was walking home and was near the corner of Merrimac and Sillistra Drive, Cole Harbor, Nova Scotia. He saw Mr. McKay and a young woman who did he did not recognize walking towards him. Mr. J. knew Mr. McKay as they both went to the same high school and there had been issues between them in relation to Mr. J.' sexual orientation. As Mr. McKay walked by Mr. J., he threw the contents of a Tim Horton's ice cappuccino beverage at him, which struck him on the left side of his face.

8) **Robbery charge - section 344 Criminal Code - February 2, 2012** – On this date, around 1 AM, Mr. McKay entered the Irving convenience store located at 1207 Cole Harbor Road, Cole Harbour, Nova Scotia. There was one clerk on duty, Mr. Robert Coish. Mr. McKay asked him for a package of cigarettes and then made 2 unsuccessful attempts to pay for the cigarettes with his Interac debit card as there were insufficient funds in the account. At that point, Mr. McKay picked up the cigarettes with his left hand and the clerk said that he then pulled out a black, pointed object from his pocket and held it in his right hand. The clerk could not specifically state that the object was a knife. Mr. McKay pointed the black object at Mr. Coish and at the same time stated "this is a robbery" and then he fled from the store with the package of cigarettes. Police confirmed that Mr. McKay used his debit card and his own P.I.N. number at the store.

With respect to this charge, the Defence does not admit that the object in Mr. McKay's hand was a knife. The position of the Defence is that the clerk only saw a dark or black pointed object in Mr. McKay's hand, but he did not describe it as a knife. During the sentencing submissions, Defence counsel advised the court that there was a dispute as to whether that object was, in fact, a knife. However, it was agreed by counsel that there would be

no need to hold a hearing to resolve that factual dispute as the Defence did not dispute the fact that Mr. McKay had made some threatening gesture with a black object in his hand which was outside of his pocket. The Defence also acknowledged that all of the essential elements of the robbery charge were established by the Crown and admitted by the Defence in entering the guilty plea to this charge.

9) **Break, enter and theft charge – section 348(1)(b) Code – February 26,2013**- On this date, around 1:45 AM, Mr. McKay and another individual broke into the Habaneros restaurant located at 380 Pleasant St., Dartmouth, Nova Scotia. Initially, there was an attempt to gain entry to the restaurant through a rear door and at that time a security camera and light were removed. When they were not able to gain entry through the rear entrance, Mr. McKay and the other individual went to the front of the restaurant and threw a rock through the front window. They entered the restaurant and after examining the cash register and determining that there was no cash, the two individuals fled from the premises. Mr. McKay was found by the K-9 unit in a nearby property at 2:40 AM. The damage occasioned at the restaurant was $1929.74. The insurance company which reimbursed the restaurant owner seeks restitution of that amount.

10) **Breach of Recognizance - section 145(3) Criminal Code -February 26, 2013** - Mr. McKay had been placed on a recognizance entered into before justice on October 25, 2012 and one of the conditions contained in that order was to "keep the peace and be of good behavior." By acknowledging his responsibility for the break, enter and theft charge on February 26, 2013, Mr. McKay also acknowledged that he had breached that condition in his recognizance.

VICTIM IMPACT STATEMENTS:

[8] Mr. A. J. filed a victim impact statement with respect to the assault on January 7, 2012 committed by Mr. McKay. Although he had lived in Cole Harbour, Nova Scotia all of his life, after this incident, for the first time, he said that he did not feel safe in his neighborhood. He did not walk the streets alone, constantly asked for a drive back home from work or took a longer route to go home to ensure that he avoided contact with Mr. McKay.

[9] In addition, Mr. Bill Pratt, the owner of the Habaneros Modern Taco Bar, whose business was broken into by Mr. McKay on February 26, 2013, filed a victim impact statement. While large parts of this Victim Impact Statement express his opinion on sentencing options, Mr. Pratt discussed the financial impact of the break-in. He pointed out that this break-in resulted in property damage which caused the business to be closed for a period of time. Since restaurants have a small margin for profit, being closed for even a short period of time can affect whether he can make the payroll for his employees.

CIRCUMSTANCES OF THE OFFENDER:

[10] The court had the benefit of a Pre-Sentence Report which indicated that Mr. McKay is a 22 year old, first time adult offender with no prior involvement in the criminal justice system. He is single at the moment, but has been with his girlfriend in an on-off relationship for the last three years and indicated that when he is released from custody, he plans to live with his girlfriend and her family.

[11] Mr. McKay stated that his parents separated when he was very young and he has no relationship with his father who has been in and out of jail all of his life. He left his mother's residence at age 17 or 18 and stated that the relationship with her was up and down and that she could be mentally abusive.

[12] According to his mother, Mr. McKay has an issue with substance abuse. She also added that her son has developed a new group of friends and has moved away from the group of friends with whom he was spending time at the time of these offences. She also added that when her son is taking his medications as directed, she sees a huge difference in his behavior and it is "like night and day." Mr. McKay said that he was diagnosed with Attention Deficit Hyper-Activity Disorder [ADHD] when he was in elementary school and he was put on medication. He stopped taking medication in grade 4 due to the side effects, but again took the medication for a short time in grade 7.

[13] Mr. McKay has a grade 11 education. He has been working on and off since he was 15 years old, most recently with a waste management company as a crew on a garbage truck and a roofing company. Prior to that, he had worked at a fish plant, removed asbestos, did carpentry work, concrete work and worked for a moving company as well as other temporary labor services. Mr. McKay would like to complete his grade 12 education or a GED and then

attend the Nova Scotia Community College to obtain certification for a trade in the oil industry.

[14] In the Pre-Sentence Report, Mr. McKay said that he has a prescription for an antipsychotic drug and he was waiting for medication for his ADHD. He added that he ran out of his medications when he lost his job and could not refill the prescriptions, and then, he started using street drugs which he feels contributed to him being involved in the various offences. Mr. McKay confirmed that street drugs have been an issue for him during the last five or six years and that he used "hard drugs" such as cocaine, crack cocaine or dilaudids for the last two years. He also indicated that the most recent offences were alcohol-related and he has had alcohol abuse problems. He has had mood swings and personality changes, but believes that his mental health is now stabilizing because he has received medications while being held in custody and he is now motivated to take the ADHD medication.

[15] During his submissions, Defence counsel filed several letters of support from the family and friends of Mr. McKay. The letters recognized that Mr. McKay was diagnosed with ADHD as a young person, had a difficult childhood and has had substance abuse as well as mental health issues. Based upon these letters and the presence of family members in court on previous occasions and again today, I have no doubt that he has strong family support in the community.

[16] Defence counsel also submits that, since Mr. McKay has been held in custody, he has gained insight and has been accepted into the Harvest House residential program to address those substance abuse issues. In addition, counsel indicated that while being held in custody, Mr. McKay has been one of the people involved in the "Woof" program, attended school and he has not any institutional incidents. Moreover, since February, 2013, he has taken steps to better himself by taking advantage of the every program that was available to him at the correctional center. This period of time in custody has been a "wake-up" call and he realizes that he has several problems to address through the programs, counseling and medication offered at the correctional center.

APPLICABLE PURPOSES & PRINCIPLES OF SENTENCING:

[17] In all sentencing decisions, determining a fit and proper sentence is highly contextual and 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.

[18] 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. McKay and general deterrence of like-minded offenders, the protection of the public as well as to assist in the rehabilitation of the offender. In addition, there is no doubt that the principal of proportionality found in section 718.1 of the **Criminal Code** must also be considered in this case 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.

[19] Parliament has also spelled out other sentencing principles in section 718.2 of the **Criminal Code** which must be considered by the court in imposing a just sanction which will contribute to respect for the law and maintenance of a just, peaceful and safe society. Given the facts and circumstances present in the case, the court is required to increase or reduce the sentence to be imposed by taking into account any relevant aggravating or mitigating circumstances relating to the offence or the offender [section 718.2(a)].

[20] In addition, the parity principle which is outlined in section 718.2(b) 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.

[21] Finally, the court must also consider, in this case, the totality principle which is found in section 718.2(c) which requires the court to consider, where consecutive sentences are imposed, that the combined sentence should not be unduly long or harsh. There is no doubt that this totality principle will be in play in this case and must be considered by the court in determining and imposing the appropriate sentence for a youthful, first time adult offender in relation to 10 separate charges which occurred over a two-year period.

[22] With respect to the totality principle**,** in **R. v. M (CA),** [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 Ruby's articulation of this principle in his *Sentencing* treatise which stated that the purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate." A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.

[23] In addition, in view of the fact that Mr. McKay is a youthful first-time adult offender, I find that it would also be appropriate to consider the impact of this sentence on his rehabilitation. This principle of restraint in imposing a first 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."

AGGRAVATING/MITIGATING FACTORS:

[24] In terms of mitigating factors present in this case: (1) Mr. McKay is 22 years old, he has no prior adult convictions or any prior youth court dispositions and as such, he is a youthful, first-time adult offender; (2) He has entered early guilty pleas on most of the charges before the court without setting trial dates; (3) Mr. McKay has entered early guilty pleas to consolidate several matters, thus saving substantial court time as well as the requirement for numerous witnesses to come to court in relation to these charges; (4) He has expressed his remorse for his actions and accepted full responsibility for them; (5) There is a generally positive Pre-Sentence Report and letters of support from members of his family which highlight his family support in the community and (6) He has worked on a regular basis at several jobs since he was 15 years old.

[25] In terms of the aggravating factors present in this case: (1) The break and enter charge cannot be regarded an impulsive action as there was a

prolonged effort to gain entry into the restaurant through the back door, damaging the security light and camera to conceal their actions and then gaining entry by breaking the front window; (2) The charges before the court result from 10 different and unrelated incidents which occurred over a period of almost 2 years between March 27, 2011 and February 26, 2013;

ANALYSIS:

[26] As I indicated at the outset of this decision, there are significant differences between the sentencing recommendations made by the Crown Attorney and Defence Counsel.

[27] The Crown Attorney's recommendation of a four-year global sentence, less any pretrial custody, is largely based on a recommended sentence for the robbery charge of 30 months together with 12 months consecutive for the break and enter charge, with recommendations for 15 to 30 days for the balance of the charges, most being served on a consecutive basis.

[28] Defence Counsel has recommended that, given the fact that Mr. McKay is a youthful, first time adult offender, the period of presentence custody would be a fit and appropriate sentence for either the robbery charge or the break and enter charge or both of those charges. Assuming that his client was in a "time served" situation for one or both of those charges, then a lengthy period of time under terms of suspended sentence and probation or under terms of a CSO of imprisonment in the community would be a fit and appropriate sentence for all of the remaining charges.

[29] Looking at the various charges before the court for disposition in this afternoon, I find that for the purpose of applying the proportionality principle found in section 718.1 of the Code, there is no doubt that the gravity of the robbery charge contrary to section 344 of the **Code** and the break and enter charge contrary to section 348(1)(b) of the **Code** are the most serious offences before the court. Given the somewhat unusual and apparently spontaneous manner in which the robbery was committed, I find Mr. McKay's degree of responsibility to be slightly lower than would normally be the case for such a serious offence. However, with respect to the break, enter and theft charge, I find that Mr. McKay's degree of responsibility for that offence is high, as I find that it required planning and persistence in a concerted effort by Mr. McKay to gain entry into the restaurant in committing this offence when his initial efforts to enter the building, had failed.

[30] The Crown Attorney has recommended periods in custody of 15 days or 30 days for the balance of the offences. With respect to those offences, I agree with the Defence counsel that, for a first time adult offender without any prior youth court dispositions, a fit and appropriate sentence for the charges of failing to attend court would likely have been fines and then elevated fines, before some form of incarceration would have been imposed.

[31] With respect to the one mischief charge and the two theft under $5000 charges, again, considering that Mr. McKay had no prior adult criminal record or any prior youth court dispositions at the time of those offences, a fit and appropriate sentence for those three charges would likely have been a suspended sentence with a period of probation to address any issues relating to Mr. McKay's rehabilitation. At the same time, in dealing with a consolidation of several charges involving multiple thefts and multiple failures to appear, then the court must also be consider the principle of totality to ensure that the total combined sentence is not unduly long or harsh.

[32] With respect to the assault charge on January 7, 2012, looking at the gravity of this offence from the point of view of physical injuries, I find that there is no evidence that there any physical injuries were suffered by the victim. However, I find that Mr. McKay's actions did cause an emotional and psychological impact on the victim of the assault. Looking at the degree of responsibility for this offence, I find that Mr. McKay's actions were planned and calculated as he saw the victim walking down the street towards him before he threw the cold coffee at the victim's head. There had been no interaction between the victim and Mr. McKay before the assault, although the evidence established that they knew each other prior to the incident. In these circumstances, I find that this assault was essentially an incident of bullying and as such I find that Mr. McKay's degree of responsibility for this offence is very high. In assessing a fit and appropriate sentence in the circumstances of this offence and this offender, I find that an appropriate sentence would focus on specific and general deterrence as well as denunciation of this unlawful conduct. With respect to this charge, I find that a fit and appropriate sentence likely have been to order a lengthy period of probation or a short CSO of imprisonment in the community followed by a lengthy period of probation.

[33] With respect to the robbery charge, Defence counsel referred to several cases from other jurisdictions where the court concluded that a fit and appropriate sentence for the robbery of a store clerk resulted in a lengthy CSO

of imprisonment or a jail sentence of less than two years. Defence counsel cited those cases for the proposition that those courts had concluded that a CSO of imprisonment in the community was both an available sanction and at the same time was also a fit and appropriate sanction.

[34] In support of his recommendation for consideration of a CSO of imprisonment or a short period of incarceration for the robbery offence, Defence Counsel referred to the following cases:

1) **R. v. Otter**, 2010 ABPC 218 - the court concluded that, in the circumstances of the case, this was not a "serious personal injury offence" as defined in section 752 of the **Criminal Code** as there was no use or attempted use of violence. The case involved a robbery by words. Mr. Otter was extremely intoxicated when he walked into a convenience store and went behind the front counter. The clerk warned him that he should not be there and Mr. Otter answered, *"you should open your till, I am robbing you".* A short struggle ensued, the clerk wrestled Mr. Otter to the ground and he was held until arrested by the police. No weapons, threats or violence were used against the clerk, nor was anything taken. The court considered that these were "exceptional circumstances" of the lowest level of a robbery, there was full compliance with bail conditions and successful completion of the treatment. The court ordered a two-year less one day CSO followed by two years on probation;

2) **R. v. Pearson**, 2012 ABQB 240 - the court ordered a two-year less one day CSO in applying the reasoning used in **R. v. Ponticorvo**, 2009 ABCA 117. The court held that, based upon the specific facts of the case, there was no evidence as to the size or shape of the knife or what the accused did with it other than hold it out towards the store clerk, he was not disguised or concealed in any way and was equivocal in his demand for money. In those circumstances, the judge concluded, at para. 47, that the accused's actions fell "within the exception" mentioned in **Ponticorvo** that "not every threat with a weapon involves the use or attempted use of violence." The court was referred to the decision of **R. v. Griffin**, 2011 NSCA 103, but concluded that Mr. Pearson's case was distinguishable from the facts in the **Griffin** case.

3) **R. v. McLeod**, 2010 ONCJ 354 - the accused was before the court to be sentenced on 2 robbery charges contrary to section 344 of the **Criminal Code**. Mr. MacLeod approached a clerk at a gas station and handed the

clerk a note which stated that he wanted all of the money in the store and that he had a gun. On the first occasion, Mr. McLeod fled with $180. The next day Mr. MacLeod came back to the same gas station and handed a note to the attendant which read *"I have a gun. I want $500 now."* Mr. McLeod obtained some money from the clerk and fled the store. He was arrested shortly after the incident and after search incidental to arrest, the police found the note in question on him, $100 in cash, but he was not in possession of a gun. The trial judge concluded that the robberies had an element of "an attempted use of violence" and therefore the accused had committed two "serious personal injury offences." As such, a conditional sentence of imprisonment was not an available sanction and taking into account all of the facts and circumstances of the case the judge ordered concurrent 90 day terms of incarceration to be served on an intermittent basis to allow Mr. MacLeod to continue his treatment program for substance abuse.

4) **R. v. Kotelko**, 2011 MBPC 76 - in this case there was unusual fact situation as Mr. Kotelko and his co-accused Ms. Lindell were boyfriend/girlfriend at the time of this incident. Ms. Lindell was the assistant manager at a store and they planned to have her boyfriend stage a robbery while she was in the store. Mr. Kotelko came in the store wearing a balaclava and had a knife in his pocket and went directly to the back office where he knew Ms. Lindell would be counting money. However, when he entered that room, there was another female employee with Ms. Lindell. He ordered both of them to the ground and said *"I have a knife in my pocket."* To the unsuspecting employee, who had no part in the staged event, the robbery was very real and terrifying. There was no allegation that the knife was pointed at any one or used in the menacing way. Mr. Kotelko grabbed the cash, pulled Ms. Lindell out of the room and fled through a back door of the store. A few moments later, Ms. Lindell called 911 and falsely told the police that she had been robbed. The couple met later and split the $3000 cash that was stolen. In the final analysis, with favorable presentence reports and youthful first time adult offenders, the court ordered four months incarceration for each offender and a $2000 fine. In doing so, the court concluded, at paras. 156-157 that, based on the particular facts and circumstances of the case, a threat of violence did not involve the "use or attempted use of violence" for the purposes of section 752 of the **Criminal Code** in determining whether it was a "serious personal injury offence."

[35] During her sentencing submissions, the Crown Attorney submitted that, while the cases from other jurisdictions may be informative or even persuasive, they are not binding on this court. However, it is the position of the Crown that the cases of **R v. Bourassa**, 2004 NSCA 127 and **R. v. Griffin**, 2011 NSCA 103 are, in fact, binding decisions on this court.

[36] In **Bourassa**, *supra*, the issue was whether a robbery had occurred on the facts of the case. The Court of Appeal noted that a robbery may be committed in more than one way according to section 343 of the **Criminal Code**. The robber approached a bank teller's wicket and pulled out a note and told her, by a motion in a grunting fashion, that he wanted her large bills. He kept his hand in his pocket at all times. Although the bank teller could not see it, she assumed that he was holding a weapon of some sort. When the teller froze and could not hand over the money, the robber came across her wicket, reached in the till grabbed packages of bills and then fled.

[37] The Court of Appeal held in **Bourassa**, *supra*, at para 7 that the difference between a "robbery" and a "theft" is that the "robbery is committed by confronting and intimidating the person whose property is taken." The Court of Appeal added, at para. 15, that a trial court should examine the entire sequence of events in the incident without simply isolating one or two actions in order to objectively determine in looking through the eyes of a reasonable observer, whether the bank teller's fear was reasonable. In **Bourassa**, the accused had a hood over his head, had sunglasses on and kept his right hand in his pocket when he passed a note to the teller. At the same time, there was the gesture and grunting sounds which made it clear that he wanted the large bills. Looking at the definition of "robbery" in section 343(a) of the **Code**, the court concluded that the clerk had been the victim of a robbery.

[38] More recently, in **R. v. Griffin**, 2011 NSCA 103, the Court of Appeal dealt with the issue of whether the robbery had been committed with violence. Ms. Griffin was 21 years old, a first time adult offender on disability benefits with a history of mental health and substance abuse issues, all of which is quite similar to the circumstances of Mr. McKay. Just before 5 PM, Ms. Griffin entered a service station wearing jeans, a black hoodie pulled over her head and sunglasses. She unfolded a 10 inch knife and tapped it on the counter. The attendant asked what she wanted and Ms. Griffin replied *"cash."* The attendant opened the till and asked *"how much?"* Ms. Griffin replied *"all of it."* The attendant gave some cash and then Ms. Griffin said *"the rest."* After receiving the balance of the cash from the till, Ms. Griffin fled from the store. The clerk

followed her, notified the police and she was arrested a short time later. The trial judge imposed a CSO based upon the positive Pre-Sentence Report, the absence of a criminal record and the fact that he had concluded that Ms. Griffin had not committed a "serious personal injury offence" because no violence had been used in the commission of the robbery.

[39] In overturning the trial judge's decision, the Nova Scotia Court of Appeal stated, at para. 22 that the term "violence" is not defined in the **Criminal Code**. In the facts of this case, the Nova Scotia Court of Appeal concluded that the trial judge had erred in making a finding of fact that violence was not used in the commission of this offence. The Court held in **Griffin**, *supra*, at para. 27, that as a matter of law, overt threats are not necessary to constitute robbery under section 343(a) of the **Code.** The court pointed out that all that is required to establish a robbery is an implied threat accompanied by reasonable apprehension of physical harm on behalf of the victim.

[40] The Court also stated, at para. 30 of **Griffin**, *supra*, that the display of the knife in the circumstances of this case, which included the wearing of a disguise and the demand for money all constituted a threat of violence. The court also held that "the threat of violence in the circumstances of this case, was itself an act of violence" in concluding that the trial judge had erred in law by finding that no violence was used and that therefore no serious personal injury offence had occurred. Based on that determination, the court stated, at para. 32 that, "it follows that a conditional sentence was legally unavailable to Ms. Griffin" and that the trial judge had erred in imposing one.

[41] In the **Griffin** case, the Nova Scotia Court of Appeal recognized, at para 36, that robbery is a serious offence requiring an emphasis on deterrence and denunciation. "A first offender may expect a term of three years [**R. v. Johnson**, 2007 NSCA 102 at para 37]. However, "in exceptional cases," a less onerous sentence has been imposed." For example, the court refers to **R. v. Benoit**, 2007 NSCA 123 where an 18-year-old with an extensive record received a sentence of 2 ½ years less remand time.

[42] In the final analysis, the Court of Appeal determined in **Griffin** that because the offender had made significant progress on her rehabilitation during the 16 months that she had been subject to the terms of the CSO, it would not be in the public interest to incarcerate her at that point. Instead, the Court of Appeal determined that the appropriate sentence of incarceration would be 16

months which was then deemed fully served and that she would then begin a period of approximately 32 months on probation.

[43] As I indicated previously, the cases referred to by Defence Counsel from other jurisdictions are informative and persuasive, but they are not binding on this court. However, decisions of the Nova Scotia Court of Appeal are binding on this court and must be considered in determining what would be a fit and appropriate sentence for the robbery charge.

[44] Keeping in mind the comments made by the Nova Scotia Court of Appeal in **Griffin**, I find that, in this case, Mr. McKay displayed a black pointed object and made a gesture with that object at the clerk, just prior to or at the same time that Mr. McKay stated "this is a robbery" and then fled from the convenience store with a package of cigarettes. From those facts, I agree with Defence counsel that there were no other aggravating circumstances such as the wearing of a disguise, there was no statement or note that he had a weapon, there was no overt verbal threat to harm the clerk nor was there a demand for money from the till. However, I find that the facts present in this case do establish that Mr. McKay's words and gestures with a black pointed object in his hand were meant to intimidate the clerk and thereby amounted to, at the very least, an implied threat of violence. Although it was not established that the black object in Mr. McKay's hand was actually a knife, I find that the black, pointed object used by Mr. McKay was "weapon" as defined in section 2 of the **Criminal Code**, as that object was used "for the purpose of threatening or intimidating any person" in committing the robbery offence. I have no doubt that the implied threat, in these circumstances, caused a reasonable apprehension of physical harm on behalf of the victim, and as such, all of the essential elements of the robbery offence were established.

[45] It is evident from several sentencing decisions which involved robberies, such as **R. v. Leet** (1989), 88 NSR (2nd) 161 (NSSC-AD) at para. 15; **R. v. Johnson**, 2007 NSCA 102 at paras. 32 to 39 and **Griffin**, *supra*, at para 36 that our Court of Appeal has recognized that robbery is a serious offence which is subject to a maximum term of imprisonment of life. Moreover, the Court of Appeal noted in those cases that, in imposing a sentence, the seriousness of the offence requires an emphasis on deterrence and denunciation. While there may be some "exceptional cases" where less onerous sentences have been imposed, the Court of Appeal has established that even a youthful first time offender may expect a term of three years unless there are some unusual or special circumstances or other mitigating factors that

would lower that so-called "starting point" to two years: see **R. v. Butler**, 2008 NSCA 102 at para. 23.

[46] Looking at the facts and circumstances of this case, I find that there was an implied threat of violence and that all of the essential elements of a robbery were established. However, given all of the circumstances of this case and the fact that Mr. McKay is a youthful, first time adult offender, I find that a fit and proper sentence for this robbery would be at the lower end of the range established by our Court of Appeal. In **Griffin**, *supra*, the court ultimately concluded, at para. 40, that an offender with a similar background to Mr. McKay who had committed the same offence as him in "the unique circumstances" of that case, would have been sentenced to a period of imprisonment of 16 months. Keeping in mind the parity principle and the proportionality principle, as well as the somewhat unique circumstances in which Mr. McKay committed this robbery, I find that the appropriate sentence for the robbery charge would be similar to Ms. Griffin, that is, a period of imprisonment of 16 months.

[47] With respect to the next most serious offence for which Mr. McKay comes before the court for sentencing today, that is, the break, enter and theft of the restaurant business, since the Crown proceeded by indictment on that charge, Mr. McKay faces a maximum term of imprisonment of 10 years. It is the position of the Crown that **R. v. Zhong**, [1986] NSJ No. 207 (NSCA) has established a three-year "benchmark" or "starting point" sentence for a break enter and theft involving a commercial premises. However, the Court of Appeal also noted in **Zhong** that the appropriate sentence may be one that moves up or down from that "benchmark" depending upon the circumstances of the offence, the particular offender and any aggravating or mitigating factors. Recently, our Court of Appeal has reiterated that three year "benchmark" for break, enter and thefts involving commercial premises: see **R. v. McAllister**, 2008 NSCA 103 and **R. v. Adams**, 2010 NSCA 42.

[48] In this case, I find that the break-in at the Habaneros restaurant was the result of actions that were planned and took a concerted effort to eventually break-into the premises. In those circumstances, I cannot find that this offence was one that was impulsive in nature so as to lessen the degree of responsibility of Mr. McKay and given the circumstances of this offence, I find that the gravity of the offence remains high. Moreover, I find that it is a significant aggravating factor that the break, enter and theft at the restaurant occurred at a time when Mr. McKay had been recently released under the terms of a

recognizance in relation to charges dating back to March 2011, which included the indictable offence of robbery, which were still before the court.

[49] Looking the purposes and principles of sentencing which must be considered with respect to the break, enter and theft charge, I find that specific and general deterrence and denunciation of the unlawful conduct are the primary sentencing purposes to be considered. However, given the fact that there is a fairly positive Pre-Sentence Report and that Mr. McKay is a youthful first time offender, I find that it is also important to focus on rehabilitation of Mr. McKay as the Pre-Sentence Report does speak to substance abuse and mental health issues, which Mr. McKay has taken steps to address and wishes to take further steps to address in the future. Taking all those factors into account, I find that a fit and appropriate range of sentence for the break, enter and theft offence would be two years of imprisonment. Furthermore, given the fact that it occurred almost one year after the robbery charge, I find that the sentence for this offence should be served on a consecutive basis to the sentence imposed on the robbery charge.

[50] However, keeping in mind the totality principle found in section 718.2(c) of the **Criminal Code** that requires the court imposing a sentence to take into consideration the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh. That principle is also expressed in the principle of restraint which requires the court, in imposing a first sentence of imprisonment, to order a period of incarceration as short as possible and tailored to the individual circumstances of the accused, rather than solely for the purpose of general deterrence.

[51] In this case, I find that ordering a 16 month period of incarceration for the robbery charge and two years consecutive for the break, enter and theft from the business premises would amount to that unduly long sentence for a youthful, first time adult offender. Having considered the parity, proportionality and totality principles with respect to break, enter and theft offence, I find that a sentence of 18 months of imprisonment would be, in the aggregate, a "just and appropriate" sanction. In addition, I find that it would be appropriate to make a stand-alone restitution order pursuant to section 738 of the **Criminal Code** in the amount of $1929.74 in favor of the Royal and Sun Alliance Insurance Company.

[52] With respect to the balance of the other charges before the court for disposition this afternoon, when I take into account the principles of parity,

totality and proportionality principle found in section 718.1 and 718.2 of the **Criminal Code,** I find that for the failures to attend court, those offences would have been addressed by imposing a fine and for subsequent offences an elevated fine. For the theft charges and the mischief damage to property charges, I have already indicated that a fit and proper sentence for those offences would have been to suspend sentence and order a period of probation.

[53] As indicated previously, given all of the facts and circumstances relating to the assault charge, I find that a one-month CSO of imprisonment followed by probation would have been a fit and appropriate sentence for that offence. However, by virtue of section 731(1)(b) of the **Criminal Code**, I find that the court does not have the jurisdiction to fine and order Mr. McKay to comply with the conditions of a probation order if the offender is subject to a term of imprisonment exceeding two years.

IS A CSO AN AVAILABLE SANCTION?

[54] In analyzing this issue, it is important to note at the outset, that the criteria which must be established before a CSO would be available were recently amended by Parliament. The most recent amendments to section 742.1 of the **Code** came into effect on November 20, 2012.

[55] As a result of those recent amendments, I find that issue of whether a CSO is an "available" sanction for Mr. McKay to serve a period of imprisonment in the community for the robbery offence, must be determined on the basis of the law as it stood on February 2, 2012, when that offence occurred. At the time of the robbery offence, section 742.1 of the **Criminal Code** read as follows:

> **742.1** If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

[56] With respect to the issue of whether or not a CSO of imprisonment in the community was an available sanction with respect to the break, enter and theft charge of the business premises on February 26, 2013, that issue is determined by the provisions of section 742.1 of the **Criminal Code** which were in force at that time. The **Safe Streets and Communities Act** (S.C. 2012, c.1, s. 34) came into force on November 20, 2012 and amended section 742.1 of the Criminal Code dealing with the imposition of a CSO. As a result, whether a CSO was an "available" sanction at the time of the break, enter and theft offence which occurred on February 26, 2013, is governed by the recently amended provisions of section 742.1 of the **Code** which now reads as follows:

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

(*a*) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;

(*b*) the offence is not an offence punishable by a minimum term of imprisonment;

(*c*) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

(*d*) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;

(*e*) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that

(i) resulted in bodily harm
(ii) involved the import, export, trafficking or production of drugs, or
(iii) involved the use of a weapon; and

(*f*) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:

(i) section 144 (prison breach),
(ii) section 264 (criminal harassment),
(iii) section 271 (sexual assault),
(iv) section 279 (kidnapping),
(v) section 279.02 (trafficking in persons — material benefit),

(vi) section 281 (abduction of person under fourteen),

(vii) section 333.1 (motor vehicle theft),
(viii) paragraph 334(*a*) (theft over $5000),
(ix) paragraph 348(1)(*e*) (breaking and entering a place other than a dwelling-house),
(x) section 349 (being unlawfully in a dwelling-house), and
(xi) section 435 (arson for fraudulent purpose).

[57] With respect to the availability of a CSO for the robbery charge which required an examination of the provisions of section 742.1 of the **Criminal Code** as it stood in February, 2012, I have come to the conclusion that this sanction is not an available option for the court to order. At that time, a conditional sentence of imprisonment in the community pursuant to section 742.1 of the **Criminal Code** was only available if the court concluded that the offender was not convicted of a "serious personal injury offence" as defined in section 752, there was no minimum term of imprisonment and the court imposed a sentence of imprisonment of less than two years.

[58] After having reviewed all of the facts and circumstances of the robbery charge, I have found that Mr. McKay made an implied threat of violence in the commission of the robbery. Based upon the Court of Appeal decision in **Griffin,** I find that this robbery was, in fact, a "serious personal injury offence" as defined in section 752 of the **Criminal Code** as it involved the use or attempted use of violence against another person for which the offender may be sentenced to imprisonment for 10 years or more. In this regard, I note that pursuant to section 344(1)(b) of the **Criminal Code**, the offence of robbery is subject to imprisonment for life. As a result of those determinations, I find that a CSO of imprisonment in the community would not be an available sanction for the court to order with respect to the robbery charge pursuant to the provisions of section 742.1 of the **Criminal Code**.

[59] With respect to the availability of a CSO for the break, enter and theft charge on February 26, 2013, as I previously indicated, the provisions of section 742.1 of the **Criminal Code** were amended, effective November 20, 2012. In the most recent amendments to section 742.1 of the **Code**, Parliament has added several more limitations to the availability of a CSO for an order of imprisonment to be served in the community. As before, Parliament has stated that a CSO will not be an available sanction if the term of imprisonment is more than two years or there is a minimum term of imprisonment. With respect to the offence of break, enter and theft of a premises other than a dwelling-house, pursuant to section 348(1)(e) of the **Criminal Code**, the maximum term of imprisonment in the case of an indictable offence is 10 years. The Crown elected to proceed by indictment with respect to this charge and in reviewing

the current provisions of section 742.1 of the **Code,** I find that a CSO of imprisonment is no longer an available sanction for the court to impose for a break, and enter of a premises other than a dwelling-house by virtue of section 742.1(f)(ix) of the **Criminal Code**.

[60] Furthermore, with respect to the determination of whether a CSO of imprisonment in the community is available, I note that in **R. v. Proulx**, [2000] 1SCR 61, the Supreme Court of Canada stated that the conditional sentence is not available unless the judge is satisfied that the appropriate sentence for the offence is a custodial one of less than two years. While it is acknowledged that Mr. McKay has been in custody for several months prior to today's decision, it is important to remember that pretrial custody cannot reduce the appropriate range of sentence to be considered at the first stage of the **Proulx** analysis when the court must determine whether a conditional sentence of imprisonment is an "available" sanction. The Supreme Court of Canada has clearly stated in **R. v. Fice**, [2005] 1 SCR 742 at para. 24, that time spent in pretrial custody is relevant only to the length of the conditional sentence, not to its availability. Time spent in pre-sentence custody in no way changes the gravity of the offence or the degree of responsibility of the offender.

[61] For all of the foregoing reasons, I have concluded that the imposition of a CSO of imprisonment in the community is not an available sanction for either the offence of robbery which was the committed by Mr. McKay on February 2, 2012 or the offence of break, enter and theft from a business premises which was committed by him on February 26, 2013. Given those conclusions, I have determined that it is not necessary to conduct the detailed analysis necessary to determine whether it would have been "appropriate" to order a conditional sentence of imprisonment in the community and whether the court was satisfied that the service of that sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purposes and principles of sentencing.

THE APPROPRIATE SENTENCE

[62] At the outset, it is important to again underline the fact that the court is dealing with 10 different offences which were committed on several different dates over a period of almost 2 years. There are several offences where, objectively speaking, the court would certainly conclude that the gravity would be less serious than other offences, and as such, fines or probation would likely have been the outcome. At the other end of the spectrum dealing with the

gravity of offences, Mr. McKay has committed two very serious offences, being a robbery and a break, enter and theft of a business premises. Given the fact that Mr. McKay is also a youthful, first-time adult offender and there are a number of charges to be addressed, this sentencing decision requires the court to take into account several sentencing objectives set out in Section 718 of the **Code** which are relevant in this case. As mentioned earlier those offences include specific and general deterrence, denunciation of the unlawful conduct and promoting a sense of responsibility for the harm done to victims and the community. The court must also be mindful of assisting the offender in his rehabilitation in imposing a just sanction to maintain a just, peaceful and safe society. Moreover, the court must also take into account the sentencing principles of proportionality, totality and restraint mentioned in sections 718.1 and 718.2 of the **Code** in imposing a series of sentences on a youthful first time adult offender.

[63] Taking all of those purposes and principles of sentencing into account, I find that it would be "just and appropriate" to make the following orders:

1) With respect to the mischief charge contrary to section 430(4) of the **Criminal Code** on March 27, 2011, I hereby order a period of 15 days in custody to be served concurrently with the sentences that I have ordered. In addition, there will be a section 738 stand-alone restitution order in the amount of $821.04 in favor of Mr. Scott Perkins;

2) With respect to the theft under charge contrary to section 334(b) of the **Code** on December 7, 2011, I hereby order a period of 15 days in custody to be served concurrently with the sentences that I have ordered;

3) With respect to the three failure to appear in court charges on January 16, 2012, January 24, 2012 and May 28, 2012, contrary to section 145(5) and section 145(2)(a) of the **Criminal Code**, I hereby order that his sentence for those matters will be one day which will be deemed served by his presence in court today;

4) With respect to the theft under charge contrary to section 334(b) of the **Code** on December 13, 2011, I hereby order a period of 15 days in custody to be served concurrently with the sentences that I have just ordered;

5) With respect to the assault charge contrary to section 266 of the **Criminal Code** which occurred on January 7, 2012, I find that the facts

and circumstances surrounding this offence demonstrate that this was an unprovoked attack which occurred on the street as the victim walked to his house. In these circumstances, I find that, although the assault did not inflict any serious physical injuries, there was a psychological impact on the victim caused by Mr. McKay's actions. However, if this offence came before the court for imposition of a just sanction without any other prior convictions, I find that sentence would likely have been a lengthy period on probation or a short CSO followed by a lengthy period of probation. In this case, I find that I must take into account the principles of totality and proportionality together with the relevant purposes of sentencing and the fact that I find that this was an incident of bullying which behavior must be denounced by the court. Having considered those purposes and principles as well as weighing all of the aggravating and mitigating factors relating to this offence and this offender, I hereby find that a sentence of 1 month of imprisonment to be served consecutively with the other sentences is a "just and appropriate" sanction in all the circumstances of this matter.

6) With respect to the robbery charge contrary to section 344 of the **Criminal Code**, I have taken into account the principles of parity, proportionality, totality and restraint together with all of the aggravating and mitigating factors to determine the just sanction for this offence. For the reasons previously outlined in this decision, I hereby order a term of imprisonment of 16 months to be served consecutive to the other sentences of imprisonment that I have just ordered.

7) With respect to the break, enter and theft charge, contrary to section 348(1)(b) of the **Criminal Code**, again, I have taken into account the principles of parity, proportionality, totality and restraint as well as all of the aggravating and mitigating factors. For the reasons which I have previously outlined in this decision, I hereby order a term of imprisonment of 18 months to be served consecutive to other sentences of imprisonment that I have just ordered. In addition, I find that it would be appropriate to make a stand-alone restitution order pursuant to section 738 of the **Criminal Code** in the amount of $1929.74 in favor of the Royal and Sun Alliance Insurance Company.

8) With respect to the breach of recognizance contrary to section 145(3) of the **Criminal Code** which occurred on February 26, 2013 when, as a result of the break, enter and theft offence which occurred that same day, Mr. McKay failed to comply with the condition in the recognizance that

required him to "keep the peace and be of good behavior." In these circumstances, I find that the fit and appropriate sentence would be to order a period of 15 days in custody to be served concurrently with the other sentences that I have just ordered

[64] As a result of all of the orders of imprisonment which I have just made on a consecutive or concurrent basis, Mr. McKay would be subject to a total term of 35 months which would be served in a federal penitentiary. However, as I have indicated previously, Mr. McKay has been held in custody since February 26, 2013. Counsel advised me that between February 26, 2013 and September 9, 2013 when the submissions were made, Mr. McKay had been held in pre-sentence custody for a total of 196 days.

[65] However, as I have previously indicated in these reasons, Mr. McKay had asked to address all of these matters on June 25, 2013, but due to a very busy court schedule that day we were not able to address his matters and the earliest date that we could allocate the time for the sentencing hearing was September 9, 2013. At that time, I indicated that I was prepared to order under section 719(3.1) of the **Criminal Code** that, in my view, the circumstances justified granting him a credit of 1 ½ days for each day spent in custody between June 25, 2013 and today's date. In the result then, I find that the presentence custody on a one-to-one basis would be 235 days as of today's date with the last 115 days , that is, from June 25, 2013 being credited on the basis of 1 ½ days for each day spent in custody. Therefore, in addition to the 235 days which were accredited on a one-to-one basis of further 58 days should be added for the period which would be credited on a 1 ½ to one day basis, for a total of 293 days, which I find to be roughly equivalent to a period of 10 months of pre-sentence custody to be credited against the sentences that I have just ordered.

[66] In the final result, on a go forward basis, I have ordered a total of 35 months of imprisonment to be served in a federal penitentiary, and after taking into account the 10 months of presentence custody, I find on a go forward basis that Mr. McKay shall serve a total of 25 months of imprisonment in a federal penitentiary.

[67] In ordering this period of imprisonment in the federal penitentiary, based upon the Pre-Sentence Report, I trust that the authorities of the Correctional Service of Canada will assess Mr. McKay for substance abuse issues, mental health issues and anger management issues. While the Pre-

Sentence Report was generally positive, I found that there were several areas that were identified by the probation officer where it was recommended that Mr. McKay get the appropriate counseling, treatment or programming to help him move forward with his life and a successful rehabilitation and reintegration into society. It is truly unfortunate that Mr. McKay did not actively participate when he was offered services and programs while he was under the auspices of the Mental Health Court. However, Mr. McKay has now taken several steps to address his long-standing issues and it is hoped that he will continue along that path while in custody and after his release.

[68] Finally, in terms of ancillary orders, the Crown Attorney also seeks an order under section 487.051 of the **Code** as the robbery charge contrary to section 344 of the **Code** is a primary designated offence and the Break, enter and theft charge contrary to section 348(1)(b) of the **Code** which is a secondary designated offence for an order authorizing the taking of bodily substances for forensic DNA analysis. I will sign those orders momentarily.

[69] In addition, the Crown seeks the section 109 **Criminal Code** mandatory firearms prohibition order, which in this case will be ordered under section 109(2) of the **Code** as this is Mr. McKay's first conviction for an offence which would result in a firearms prohibition. I will sign this order in due course.

[70] Given the fact that I have ordered a period of time to be served in a federal penitentiary, it would be an undue hardship to impose the victim fine surcharge on Mr. McKay for any of the charges that have been dealt with this afternoon.

Order Accordingly,
Judge Theodore K. Tax
Judge of the Provincial Court

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Appendix "A"

On the 27th, day of March, 2011, at or near Eastern Passage, Nova Scotia, did unlawfully and wilfully damage the property of Scott Perkins and did thereby commit mischief, contrary to Section 430(4) of the Criminal Code
AND FURTHER on the 7th day of December, 2011, at or near Halifax, Nova Scotia, did unlawfully have in his possession merchandise of a total value not

exceeding $5,000.00, the property of Atlantic Wholesalers Ltd. doing business under the name of the Atlantic Superstore, knowing that it was obtained by the Commission in Canada of an indictable offence, to wit, theft, contrary to Section 355(b) of the Criminal Code.

AND FURTHER on the 16th day of January, 2012, at or near Halifax, Nova Scotia, unlawfully having been named on an Appearance Notice that has been confirmed by a Justice under Section 508 of the Criminal Code fail without lawful excuse to attend court in accordance therewith by not appearing in Halifax Provincial Court on the 16th day of January, 2012, contrary to Section 145(5) of the Criminal Code.

AND FURTHER on the 24th day of January, 2012 at or near Dartmouth, Nova Scotia unlawfully having been named on an Appearance Notice that has been confirmed by a Justice under Section 508 of the Criminal Code fail without lawful excuse to attend court in accordance therewith by not appearing in Dartmouth Provincial Court on the 24th day of January, 2012, contrary to Section 145(5) of the Criminal Code.

AND FURTHER on the 13th day of December 2011, at or near Dartmouth, Nova Scotia, unlawfully steal merchandise of a total value not exceeding $5,000.00, the property of SLD Pharmacy Ltd. doing business under the name of Shoppers Drug Mart, contrary to Section 334(b) of the Criminal Code.

AND FURTHER on the 7th day of January 2012, at or near Cole Harbour, Nova Scotia, unlawfully assault A. J. contrary to Section 266, of the Criminal Code.

AND FURTHER on the 2nd day of February 2012, at or near Cole Harbour, Nova Scotia, unlawfully rob Robert Coish contrary to Section 344 of the Criminal Code

AND FURTHER on the 26th day of February, 2013 at or near Dartmouth, Nova Scotia, unlawfully break and enter a place to wit, Habaneros, situated at 380 Pleasant Street, Dartmouth, Nova Scotia, and did commit therein the indictable offence of theft, contrary to Section 348(1)(b) of the Criminal Code.

AND FURTHER that Devon Mathew Mckay at the same time and place aforesaid, while being at large on his Recognizance entered into before a Justice on the 25th day of October, 2012, and being bound to comply with a condition of the Recognizance directed by the said Justice fail without lawful excuse to comply with that condition, to wit, "Keep the Peace and Be of Good Behaviour", contrary to Section 145(3) of the Criminal Code.

AND FURTHER on the 28th day of May 2012 at or near Halifax, Nova Scotia being at large on his Recognizance given to a Justice on the 18th day of April, 2012, did without lawful excuse fail to attend Halifax Provincial Court on the 28th day of May, 2012, in accordance therewith, contrary to Section 145(2)(a) of the Criminal Code.

Date: 20131106
Docket:2314956,2402852,2414633,2424381,2401610,2423931,2426103,2566515, 2566519,2468881
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Devon Matthew Mckay

Revised Decision: The text of the original judgment has been corrected according to this erratum dated December 16, 2013.

Judge: The Honourable Judge Theodore K. Tax, J.P.C.

Oral Decision: November 6, 2013

Charges: Please see Appendix "A"

Counsel: Janine Kidd, for the Crown
Alfred Seaman, for the Defence

Erratum:

Paragraph 3, sentence 1 , replace “who’d “with “which”.