SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. L.K.M.,* 2024 NSSC 189

Date: 20240628
Docket: 519288
Registry: Halifax

Between:

His Majesty the King

v.

L.K.M.

Restriction on Publication: s. 486.4(2.2) *Criminal Code*
Sentencing Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	May 24, 2024, in Halifax, Nova Scotia
Final Written Submissions:	June 7, 2024
Counsel:	Sean McCarroll and Nicholas Comeau for the Provincial Crown LM, self-represented

Order restricting publication - sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court:

Introduction

[1] After a trial by judge and jury, LM was found guilty of the following offences:

1. Between January 1 and January 31, 2022, in Halifax, did assault MW contrary to s. 266(a) of the *Criminal Code* ("CC");
2. On August 18, 2022, in Halifax, did:
   A. Assault IM contrary to s. 266(a) CC;
   B. Utter a threat to MW to cause bodily harm or death to MW contrary to s. 264.1(1)(a) CC;
3. On August 19, 2022, in Halifax, did unlawfully take a motor vehicle, to wit, a truck, without the consent of MW, the owner thereof, with intent to drive it, contrary to s. 335(1) CC; and
4. On August 20, 2022, in Halifax, did unlawfully and wilfully resist Constable Sean Upshaw, a peace officer, while engaged in the lawful execution of his duty, contrary to s. 129(1) CC.

[2] LM has from the time of his arrest on August 20, 2022, consented to his remand into custody. He was repeatedly remanded after trial on these charges and ultimately to June 28, 2024, for sentencing (while continuously subject to a no direct or indirect contact order regarding MW and her two children per s. 516(2) CC).

[3] The sentencing of an offender is arrived at by a Court, after a consideration of the circumstances of the offences, and the circumstances of the offender, in light of the relevant statutory and common law factors, and principles of sentencing.

[4] In summary, I sentence LM to:

1. Two years imprisonment in a federal institution (after having taken account of all relevant remand credits, mitigating and aggravating factors, and applying the "totality" principle);
2. Followed by two years' probation;
3. A Non-Communication Order per s. 743.21 CC during the custodial period of his sentence;
4. A firearms/ammunition and weapons prohibition Order per s. 110(2.1) CC, during LM's lifetime;
5. A DNA Order per s. 487.051(3)(b) CC in relation to the s. 266 and s. 264.1 CC convictions;

6. Although I would have been required to impose a s. 737 victim surcharge order ($200 for each conviction) I exempt LM under ss. 2.1 on the ground of "hardship".

A – The circumstances of the offences

[5] A jury does not give reasons for why it has found an individual guilty of an offence.

[6] Section 724 CC sets out how a judge should examine the circumstances to ascertain what findings of fact the jury made in relation to the offences. That section and surrounding sections read:

> Submissions on facts
>
> 723 (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.
>
> Submission of evidence
>
> (2) The court shall hear any relevant evidence presented by the prosecutor or the offender.
>
> Production of evidence
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> (3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.
>
> Compel appearance
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> (4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.
>
> Hearsay evidence
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> (5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person
>
> (a) has personal knowledge of the matter;
>
> (b) is reasonably available; and
>
> (c) is a compellable witness.
>
> R.S., 1985, c. C-46, s. 723 1995, c. 22, s. 6
>
> Information accepted
>
> 724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.
>
> Jury
>
> (2) Where the court is composed of a judge and jury, the court

(a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and

(b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

Disputed facts

(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

(a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

(b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;

(c) either party may cross-examine any witness called by the other party;

(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and

(e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

R.S., 1985, c. C-46, s. 724 1995, c. 22, s. 6

Other offences

725 (1) In determining the sentence, a court
(a) shall consider, if it is possible and appropriate to do so, any other offences of which the offender was found guilty by the same court, and shall determine the sentence to be imposed for each of those offences;

(b) shall consider, if the Attorney General and the offender consent, any outstanding charges against the offender to which the offender consents to plead guilty and pleads guilty, if the court has jurisdiction to try those charges, and shall determine the sentence to be imposed for each charge unless the court is of the opinion that a separate prosecution for the other offence is necessary in the public interest;

(b.1) shall consider any outstanding charges against the offender, unless the court is of the opinion that a separate prosecution for one or more of the other offences is necessary in the public interest, subject to the following conditions:

(i) the Attorney General and the offender consent,

(ii) the court has jurisdiction to try each charge,

(iii) each charge has been described in open court,

(iv) the offender has agreed with the facts asserted in the description of each charge, and

(v) the offender has acknowledged having committed the offence described in each charge; and

(c) may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge.

Attorney General's consent

> **(1.1)** For the purpose of paragraphs (1)(b) and (b.1), the Attorney General shall take the public interest into account before consenting.
>
> **No further proceedings**
>
> **(2)** The court shall, on the information or indictment, note
>
> > **(a)** any outstanding charges considered in determining the sentence under paragraph (1)(b.1), and
> >
> > **(b)** any facts considered in determining the sentence under paragraph (1)(c),
>
> and no further proceedings may be taken with respect to any offence described in those charges or disclosed by those facts unless the conviction for the offence of which the offender has been found guilty is set aside or quashed on appeal.
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> R.S., 1985, c. C-46, s. 725; R.S., 1985, c. 27 (1st Supp.), s. 158, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 6 1999, c. 5, s. 31
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> **Offender may speak to sentence**
>
> **726** Before determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say.
>
> R.S., 1985, c. C-46, s. 726; R.S., 1985, c. 27 (1st Supp.), s. 159, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 6
>
> **Relevant information**
>
> **726.1** In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.
>
> 1995, c. 22, s. 6

[7] LM did not call any witnesses in his defence during the trial, nor did he himself testify, though he was well aware that he had that right and had ample opportunity to think on it.[1]

[8] He did have the opportunity to, and did, cross-examine all the Crown witnesses (MW; Constable Mark Kidston; Constable Jared MacGregor; Constable Sean Upshaw).

[9] Let me expressly reference what I conclude are the findings of fact "express or implied, that are essential to the jury's verdict of guilty" in relation to each offence, including some contextual evidence as well.

1 – s. 266(a) CC – January 2022 – Assault of MW

[10] Assault of MW (who I find on the evidence and my having seen her, was likely in her mid to late thirties at trial, approximately five feet tall, and of a slight build, in contrast to LM who was 48 years old at trial, five feet ten inches and of a muscular build). I find more likely than not that they each were of similar physical sizes at the time of the offences.

[11] MW testified that she owned the house at xxx Herring Cove Road, Halifax, Nova Scotia.

[12] LM had been living with her and her two children, aged approximately seven and three years, in that house since November 2021.

[13] He had been working with a friend that day, and later they had both been drinking at the house. He suggested a threesome of sexual activity and MW agreed although it was quite late at night.

[14] Thereafter at some point, she became so tired that she wanted to sleep and told LM this.

[15] She testified he "flipped out on me" punching a mirror causing it to smash and cutting his hand. He also broke a lamp. As she put it, he "turned into a different person" and repeatedly slapped her across the face on both sides using both his hands, while calling her a "fucking pig".

[16] MW testified this gave her two black eyes which continued to be visible until about six weeks later.

[17] He also punched her in the chest with such force that she had pain for several weeks. He punched her right thigh and grabbed her by the hair, stating "I should snap your fucking neck".

[18] He threatened to kill her and the other guy who was present. She noted that this violent behaviour stopped and started, and went on over a couple of hours in total.

[19] MW stated: "I was so scared – he put himself between me and the door so I could not get out of the room".

[20] It ended when LM did calm down enough to stop hitting her, and eventually fell asleep.

[21] The next day he still remained a little agitated and they stayed in the house until later in the day when they went out.

[22] At some point LM apologized and stated: "I can't believe I did this to you"; and promised he would never hurt her two children.

[23] MW further testified that she was sufficiently scared that Friday night (likely January 28, 2022) that she took her children and went to stay in a hotel, and the following night they stayed at a friend's house.

[24] Having watched MW testify, in my opinion she was a very credible witness, and I am satisfied the jury accepted the above-noted testimony from her as the

basis for the finding of guilt regarding the assault upon her.

[25] For purposes of sentencing, I must note here that during LM's cross-examination of MW in relation to this incident, in a moment of resignation / frustration, he made the following comment: "I'll deal with all these people when I get out."[2]

[26] My interpretation of what he said, was that he intended it to be taken seriously, and that once he was released from incarceration, the adult civilians - MW in particular - and those who were directly or indirectly involved with the offences alleged against him, including MW's present partner, consequently should expect repercussions.

2 – s. 266(a) CC –August 18, 2022 - assault of IM around suppertime and s. 264.1(1)(a) CC – threats to cause bodily harm or death to MW

[27] LM drew by hand Exhibit 2 which was a drawing of the interior of MW's home where the assault was alleged to have taken place. At that time, her daughter IM was seven years old. Her son E. was three-four years old. She and LM did not share the children in a legal sense however they were all living in a house at xxx Herring Cove Road, owned by MW.

[28] MW's evidence was to the effect that although she did not directly see LM strike her daughter, she was only about six feet away from where her daughter was, when her daughter came to give her an iPhone which was ringing.

[29] MW was initially turned away from her daughter when she "heard the smack". She heard "a slap and thump". She then observed IM sitting on the floor very upset and crying, with her hand on her cheek, which was reddened.

[30] She testified that when she confronted him, LM admitted he had struck IM, and he was physically present close by; he was "very, very, angry" and stated: "she [IM] deserved it", because "she rules the house".

[31] She testified that LM had been waiting for a phone call from police about something else, and that her phone was laying very close to his in the kitchen.

[32] She inferred that LM thought IM had given MW his phone, rather than her own phone - consequently he became angry at IM.[3]

[33] At some point, while she continued to verbally protest against LM's having struck IM, she then found herself backed up against the wall and LM "came very close to me – he told me I needed to shut up or things would get ugly… I knew that if I got angry at him, he would get violent towards me… I told him he needed to leave… He had nowhere else to go that night… So, I let him stay for that evening.… I didn't want to provoke or upset him."

[34] She testified that on August 18, 2022, he was drinking and "quite possibly intoxicated"; "I was scared he might hit me – he has hit me before."

3 – s. 335(1) CC – August 19, 2022 – take motor vehicle without consent

[35] This charge specifically read:

> And further that he did on August 19, 2022, at the same place aforesaid, did unlawfully take a motor vehicle, to wit, a truck, without the consent of MW the owner thereof, with intent to drive it, contrary to s. 335(1) of the *Criminal Code*.

[36] Initially MW testified that on that morning, LM "told me he was taking my truck – if I did not give it to him, he was 'going to do something'."

[37] She elaborated that in the past he would start breaking things in her house, that he had done it before – kicked in the stove, broken a TV and mirror. Moreover, he did not have a valid driver's license at the time, yet he drove Ms. Boutilier to work in MW's truck (according to what Ms. Boutilier later told her).

[38] He came back to the house later that same day in the truck. She testified in part:

> I thought he might be returning the truck – I questioned him – he looked at me from head to toe, and said, "No! How else am I going to get around … Use the fucking bus?"

[39] A short time later, he left in the truck again, and she was in a bit of "a state of shock – I knew I had to call the police", and she was anxious that he might come back again, and she better get out of the house.

[40] In the evening of August 19, 2022, MW and her children stayed in a hotel.

[41] She received a call from Diana Boutilier that LM had gone back to the house on Herring Cove Road. MW decided "it was time to call the police about him because I did not feel safe to go back to my house".

[42] On August 20, 2022, at approximately 6:00 p.m., MW met at the Petro Canada gas station at 231 Herring Cove Rd. with Constable Jared MacGregor of Halifax Regional Police.

[43] He also became aware that MW complained that her truck had been stolen by LM. He still had the truck that he had taken on August 19, 2022.

[44] She informed Constable MacGregor that on August 19, 2022, when he took her truck without her permission, he told her he was taking her truck ("he basically just told me he was taking it"), and she understood from his demeanour and language, that if she tried to stop him, he would hurt her and/or break things in her

home. She was particularly concerned because he did not have a valid driver's license at that time.[4]

4 – s. 129 CC – resisting arrest – August 20, 2022

[45] In the evening of August 20, 2022, Constable MacGregor, Constable Kidston and Constable Upshaw converged on 6846 Chebucto Road, Halifax, as they believed LM was present there and they were tasked to arrest him.

[46] They saw MW's truck parked nearby.

[47] Constable MacGregor was aware that LM remained bound by a Release Order entered into on April 22, 2021 (which remained in place until that relevant sentencing on February 1, 2023) with conditions that he not possess, use, or consume any alcoholic beverages or be under the influence of alcoholic beverages when outside of his residence.[5]

[48] LM was in a basement unit of that small apartment building and was surrounded by people who were drinking alcoholic beverages.

[49] Constable Kidston saw him from outside the building and told him that the police wanted to speak to him. LM saw him and went into another room.

[50] Constable MacGregor also saw LM, and knocked on the window and asked him if he would come to the door of the building.

[51] He told LM that he was there to arrest him for assault in relation to IM and MW, as well as taking her truck without consent, breach of his release conditions, and threats to MW.

[52] He then lost sight of LM.

[53] Constable Upshaw, who was in a readily identifiable police uniform, as were the other officers, also observed LM as he was sneaking out the back of the building. He yelled to him: "Halifax Police - stop you are under arrest".

[54] LM ran as quickly as he could down Chebucto Road.

[55] The jury concluded that LM knew the police were there to arrest him, and in order to avoid that, he ran away, and then physically resisted the arrest.

[56] Constable Upshaw caught up to LM, tackled him, and placed him under arrest. He had run about 200 feet at that point. LM resisted being handcuffed.

[57] LM was thrashing around and actively trying to strike and kick Constable Upshaw, in which respect he was successful.

[58] Constable Upshaw had to deliver some close strikes to LM's face to subdue him. He estimates the struggle to have lasted three minutes.

[59] The key to MW's truck was found in LM's pants pocket.

[60] Once subdued and taken to Halifax Regional Police booking station, LM was also formally arrested for "unlawfully and wilfully resisting Constable Sean Upshaw a Peace Officer while engaged in the lawful execution of his duty, contrary to Section 129(a) of the *Criminal Code*".

Victim Impact Statement – s. 722 CC

[61] No Victim Impact Statements have been tendered.

[62] However, I note that at the sentencing submissions, the Crown conveyed to the Court the wishes of MW to have a non-communication / no contact order for "as long as possible".

[63] I am satisfied, based on the evidence presented at trial, that MW was significantly impacted by these offences (in the physical sense regarding the assault; and in the psychological / emotional sense regarding all the relevant offences) which occurred between late January and late August 2022.

[64] I am similarly satisfied, that the children, particularly IM, experienced traumatic impacts by their presence in the home at the time of these incidents, and associated times when the residual effects of MW's suffered trauma, whether physical, psychological or emotional, would have been apparent to them.

B – The circumstances of the offender

1 – Pre-Sentence Report ("PSR")[6]

[65] Pursuant to s. 721 CC, on March 18, 2024, a PSR was formally requested.

[66] On March 27, 2024, Dawn Gillis, Probation Officer, wrote to the Court:

> [LM] appeared before the Court on March 18, 2024, at which time a Pre-Sentence Report was requested pertaining to [the offences for which he was found guilty].
>
> An interview was scheduled for March 25, 2024, at 1:00 p.m., however this writer was informed by staff at the Central Nova Scotia Correctional Facility that [LM] refused to participate in the Pre-Sentence Report interview. Therefore, a Pre-Sentence Report is not available for the Court at this time.

[67] The Court requested and obtained the last available PSR prepared in relation to LM.

[68] It was dated January 26, 2023, and prepared for a matter in Provincial Court

to be sentenced February 1, 2023, regarding offences in April and July 2021.

[69] In that PSR, regarding offences that occurred before LM started to reside with MW in November 2021, LM was interviewed within the preceding several months (i.e. October, November, and December 2022) which interviews followed his being in custody on the present offences since August 20, 2022.

[70] In that January 26, 2023, PSR it states:[7]

> [LM] reported he is currently single, however declared having three long-term relationships… BD, and TM, for 10 years. He noted he had two children during this time with both women… [LM] commented his third long-term relationship was with [MW]. He reported having a relationship with [MW] for one year, stating they had a great union and never argued. He noted [MW] has two children, [IM] aged seven, and [E] aged three, from a previous relationship.
>
> The subject referenced having a great relationship with the children, adding they would enjoy family trips to Prince Edward Island, going to Sandspit, swimming and enjoying walks; he noted the children are also very close to his mother. [LM] stated "I really love those kids. I enjoy my time with them, especially being home for them at bedtime". The subject advised he is on remand until February 2024, as a result of an incident with his ex-girlfriend's daughter, where he is no longer allowed to have contact with her. He stated: "I wish I had of put my family first and had of done differently".

[71] That PSR chronicles how LM has been plagued by alcohol abuse since he was a teenager, and that although he reported that he was diagnosed with Attention Deficit Hyperactivity Disorder when he was younger and being prescribed medication therefore, he "stated he did not take the medication, as it would have a great impact when he would consume alcohol".

[72] The author notes:

> LM reported his alcohol consumption began when he was in junior high school… His alcohol consumption became more frequent when he entered high school and commented his alcohol consumption since then has never ceased, unless he was incarcerated… He consumed alcohol more often when he got sick, as a way of coping… He would occasionally use cocaine, typically if he consumed too much alcohol… typically smokes marijuana, 7 g per day stating: "I use this just to help my brain from racing". The subject advised he has never participated in any type of addictions treatment programming… He is not seeking support for mental health issues at this time. The subject reflected having depression and anxiety since being in custody, as well as feeling defeated, commenting "my head's just racing, feeling like I'm all over the place".

[73] The PSR refers to the victim of the offences for which he was sentenced, as [JY], and that LM pleaded guilty to the 4 offences. These offences only shortly preceded LM's moving into MW's home in November 2021.

[74] I infer from the comments in the January 26, 2023 PSR, that these incidents also involved another female intimate partner.

[75] The PSR refers to the offences and dates of commission thereof as follows:

- 264.1(1)(b) CC – April 21, 2021;
- two counts of s. 430(4) CC - April 21, 2021;
- 145(5)(a) CC – July 21, 2021;

for which he received 90 days custody and 12 months probation in total on February 1, 2023.

[76] Therefore, his probationary period would have ended approximately on or about May 1, 2024.

[77] I bear in mind that he has been in custody on the present charges since August 20, 2022.

[78] Effectively, he was not supervised in the community because he was incarcerated for the entire time his Probation Order was operative.

[79] The PSR further notes under "Corrections History":

> [LM] has previously been supervised in the community and also served custody terms.… has been charged in the past with similar offences that are currently before the Court. He was sentenced in Halifax Provincial Court on October 28, 2020, to a 60-day Conditional Sentence Order followed by 18 months of probation supervision. During that time, LM was supervised by Probation Officer Greg Sullivan out of the Spryfield Correctional Services office, and he completed his Conditional Sentence Order; however, he lacked follow-through and failed to report as directed on his Probation Order.
>
> Assessment of Community Alternatives/Resources
>
> …
>
> [LM] recognizes he has addiction issues but presents as being in a pre-contemplative stage where he is resistant to treatment options.
>
> Should the Court deem a period of community supervision is appropriate, the subject should be considered to attend for an assessment in substance abuse and mental health, as well as treatment and counselling in partner/spousal violence intervention.[8]
>
> [My underlining added]

[80] I am satisfied that the previously identified rehabilitative programming for his earlier sentencing has not been meaningfully, if at all, undertaken while he was incarcerated.

[81] This is troubling because, in January 2023, he was considered at risk in relation to the following matters: substance abuse, mental health, partner / spousal violence; and there is no suggestion that he has participated in any rehabilitative programs, or that he had any interest in participating in any rehabilitative programs while serving his present sentence which has an Earliest Release Date of August 5, 2024.

[82] Moreover, during the sentencing submissions herein, once LM became aware that the Crown was seeking a two-year period of probation with conditions specifically to refrain from the possession, use of alcoholic beverages, and to not be in any premises where such items are sold, he made representations that included words to the effect that he is a "functioning alcoholic", and the day he gets out of jail, he's going to "crack a beer" and continue to drink every day regardless of whether he is prohibited by a Probation Order from doing so.

[83] He views his present criminal charges, and others in the past, as stemming not from him having committed offences as a result of his alcohol consumption, but rather, "trouble coming to find him", when he is coincidentally drinking, which he claimed he does every day of the year.

[84] LM also repeatedly referenced throughout these proceedings that he has ADHD and been prescribed a medication therefore, however while incarcerated he has almost never received that medication.

[85] While I accept that the lockdowns at the Central Nova Scotia Correctional Facility ("CNSCF") have at times interfered with the provision of medication to inmates, it is unlikely that, as LM claims, if he has a prescription for such medication, that he has almost never received his medication since being on remand there on August 20, 2022.[9]

[86] I also note that even when released, there is serious doubt whether he would take the medication in question in any event, since in the January 26, 2023 PSR, the author states under "Health and Lifestyle":

> The subject stated he was diagnosed with [ADHD] when he was younger. He recalls being prescribed Concerta, but stated he did not take the medication, as it would have a great impact when he would consume alcohol … The subject elaborated on his alcohol consumption, stating "even before I would get in the car in the morning, I would have 8 – 12 beer. I wake up at 6 AM, and I will drink while getting the kids ready for school". [LM] pointed out he consumed alcohol more often when he got sick, as a way of coping. He advised he would purchase two 36 packs of beer and a 40-ounce bottle of vodka per day. The subject commented "I wouldn't necessarily drink it all, but I had to have it in the house." … reported he typically smokes marijuana, 7 g per day, stating "I use this just to help my brain from racing". The subject advised he has never participated in any

type of addictions treatment programming.

[My underlining added]

2 – Criminal Record (DOB October 12, 1975)[10]

Offence (CC)	Sentence Date	Sentence
s. 249(1) dangerous driving	May 1, 1992 (PEI Youth Court)	4 months (open custody) + 20 mos. Probation
s. 334(a) theft > $1,000		
s. 354 possession of property illegally obtained		
s. 430(4)(b) mischief to property		
[16 charges]		
s. 430(4)(a) mischief to property		
s.335 take vehicle without consent		
s. 334(b) theft under $1000	Feb. 3, 1994	12 mos. Probation
s. 430(4)(b) mischief	June 20, 1995	12 mos. Probation
s. 430(4)(b) mischief	Jan. 18, 1996	1 mo. Custody
s. 368(1)(a) forgery	Oct. 22, 1996	2 mos. + 24 mos. Probation
s. 334(a) theft > $1,000 (Alberta)	March 30, 1998	$1,500 fine
s. 249(1) Dangerous Driving	April 24, 1999	Total: 5 mos. + 7 days
s. 348 Break & Enter and Theft		
s. 253(a) Impaired Driving		
s. 354 Possession Stolen Property		
s. 253(a) Impaired Driving (Alberta)	Nov. 29, 2000	Total: 30 days each charge and 12 mos. Probation
s. 430(1)(a) Mischief		
s. 264.1(1)(a) Threats		
s. 129(a) Obstruction (Alberta)	Dec. 6, 2000	$1000 fine
s. 254(5) Fail to Provide (Alberta)	May 14, 2002	Total: 5 mos. + 15 days
s. 270(1)(a) Assault Police		Remand time served
s. 733.1 Breach Probation		
s. 254(5) Fail to Provide (Alberta)	March 9, 2004	Total: 243 days Custody
s. 145(2) Fail to Attend Court		
s. 254(5) Fail to Provide		
s. 259(4) Prohibited Driving		
s. 145(5) Fail to Appear X 2		
s. 430(4) Mischief (Halifax)	Sept. 25, 2006	Total: time served + 1 year Probation
s. 267(a) Assault with Weapon		
s. 264.1(1)(a) Threats		

s. 254(5) Fail to Provide (Halifax)	Feb. 4, 2010	Total: $1,500
s. 270(1) Assault Police (Alberta)	Aug. 9, 2010	Total: 60 and 14 days Custody
s. 145(2) Fail to Attend Court		
s. 253(1)(b) Over 80 milligrams alcohol Driving (Alberta)	Sept. 1, 2010	Total: 3 days custody + Driving prohibition 3 years
s. 259(4) Prohibited Driving		3 years Probation
s. 145(3) Fail to Comply		
s. 271 Sexual Assault (Alberta)	Sept. 7, 2012	1,024 days (+ 71 days pretrial); s. 109 Weapons Prohibition
s. 430(4) Mischief (Halifax)	March 14, 2017	12 months Probation
s. 259(4) Prohibited Driving (PEI)	Nov. 16, 2018	Total: 120 days Custody
s. 254(5) Refusal to Provide		
s. 733.1(1) Breach Probation X 2 (Halifax)	Oct. 28, 2020	Total: 60 days Conditional Sentence
s. 430(4) Mischief		
s. 145(5) Fail to Attend X 2		
s. 145(5.1) Faily to Comply with Undertaking		
--		
s. 264.1(1)(b) Threats (Halifax)	Feb. 1, 2023	90 days Custody + 12 months Probation
s. 430(4) Mischief X 2		
s. 145(5)(a) Breach Release Order		
(All the foregoing offences date from April 21 and July 21, 2021)		
s. 320.14(1)(a) Impaired Driving	Feb. 1, 2023	Total: 248 days deemed served (210 days + 2 mos. Concurrent + 38 days consecutive respectively re May 4, 2022) + 18 mos. Probation
s. 320.17 Flight from Police		
s. 145(5)(a) Breach Release Order		
(All the foregoing offences stem from May 4, 2022 incidents)		
s. 320.14(1)(a) Impaired Driving (June 10, 2022)	May 23, 2023	Total: 661 days Custody
s. 145(3) Fail to Attend (on July 26, 2022)		60 days Custody concurrent[11]

3 – Pre-sentence remand credits

[87] Regarding pre-sentence credit for the offences at issue in this sentencing, I agree with the Crown's summary in its Supplemental Brief at paras. 10-19

(dated May 22, 2024) as follows:

> The Accused has been incarcerated and remanded on this matter since the date of his arrest: **August 20th, 2022**;
>
> The next relevant entry after **August 20th, 2022**, is when the Accused was sentenced to ninety (90) days custody (on go forward basis) plus twelve months probation for four (4) offences in Nova Scotia Provincial Court. This sentencing date was **February 1st, 2023**;
>
> There were one hundred and sixty-five (165) real days between **August 20th, 2022**, and **February 1st, 2023**;
>
> In addition, on that same **February 1st, 2023** day, the Accused plead guilty and was sentenced on three (3) additional offences in Nova Scotia Supreme Court. He then applied two hundred and forty-eight (248) days of his accumulated remand credit for those (3) offences. This was this entirety of his credit that he had accumulated by that time on the 1.5 to 1.0 basis (Summers credit applied) (i.e. 165 real days x 1.5 = 247.5 days then rounded up to 248 days);
>
> Therefore, it stands to reason that the accused began to serve his ninety (90) day NSPC sentence going forward from **February 1st, 2023**;
>
> Ninety (90) days on from **February 1st, 2023**, would have brought the Accused's release date to **May 2nd, 2023**. This of course is unadjusted for early and/or statutory release;
>
> Relevant to the case at Bar is that twenty-one (21) days after **May 2nd, 2023** on **May 23rd, 2023**, the Accused was sentenced to a six hundred and sixty one (661) day custodial sentence imposed in Nova Scotia Provincial Court;
>
> This latest sentence / matter had previously been under appeal. It is the Crown's respectful understanding that the appeal is no longer pending before the Courts;
>
> Based on the above calculation, the Crown respectfully submits that the maximum amount of time that the Accused has to his credit is twenty-one (21) real days of presentence custody. Stated differently, all other days since **August 20th, 2022**, were applied towards sentences or are sentences that [LM] is currently serving.
>
> Applying 1.5 to 1.0 *Summers* credit, that total remand credit available to [LM] is thirty two (32) days of presentence custody credit. In fairness, in its sentencing brief, the Crown had already conceded that this *Summers* credit would be applicable;

[88] As I further stated to counsel and LM in my May 16, 2024 letter regarding the sentencing evidence and submissions hearing on May 24, 2024:

> At that time, [LM] will <u>also</u> have the <u>opportunity to testify</u> on his own behalf about his relevant general background circumstances that he wishes to present to the Court (for example, to explain whether he has been diagnosed with ADHD, receiving medications therefor at the time of the offences and at present while in custody).

This will also include him [having] an opportunity:

1- Pursuant to s. 723 Criminal Code to present evidence by testifying regarding facts that are relevant to the Court's sentencing of him (for example, to explain to what extent he has experienced particularly punitive conditions of pretrial/sentence incarceration arising out of lockdowns at the Central Nova Scotia Correctional Facility - see for example in the case of *habeas corpus* applications: *Diggs v AGNS*, 2024 NSSC 11 (under appeal) and *Wilband v AGNS*, 2024 NSSC 128;

2- Pursuant to s. 726 Criminal Code to address the Court by making representations of relevant facts (for example, whether as a result of inadequate staffing at the Central Nova Scotia Correctional Facility [LM] has been locked down in his cell along with other inmates for such extended periods of time that, in contrast to normal operating conditions at the institution, they rise to the level of being "harsh", or as Justice Doherty stated in *R v Marshall*, 2021 ONCA 344 at para. 50:

> "a '*Duncan*' [2016 ONCA 754] credit is given on account of particularly difficult and punitive pre-sentence custody conditions which go well beyond the normal restrictions associated with pretrial custody… [para. 52] The '*Duncan*' credit is not a deduction from the otherwise appropriate sentence but is one of the factors to be taken into account in determining the appropriate sentence. Particularly punitive pretrial incarceration conditions can be a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at the appropriate sentence from which the *R v Summers*, 2014 SCC 26[s 719(3.3) *Criminal Code*] credit will be deducted. Because the '*Duncan*' credit is one of the mitigating factors to be taken into account, it cannot justify the imposition of a sentence which is inappropriate having regard to all of the relevant mitigating or aggravating factors…"

[89] The Crown responded in its May 22, 2024 brief:

> Respectfully, in terms of *Duncan* credit, the Crown has taken note of the growing number of recent cases that outline the difficult and arduous conditions in the Central Nova Scotia Correctional Facility. (This includes the cases that were provided with the Court's May 16th, 2024, correspondence). In addition, the Accused has also referenced the conditions at the CNSCF numerous times during his various prior Court appearances;
>
> As such, subject to any potential additional evidence to be provided by the Accused, the Crown does not oppose the potential application of additional *Duncan* credit to the thirty-two (32) [*sic]* days credit that are currently available to Mr. MacPherson. Respectfully, the Crown's position is that potential *Duncan* credit would be limited to only these 32 [*sic*] days;[12]

[90] Insofar as a so-called "*Duncan* credit" is concerned, I am well satisfied that LM likely has, since at least the Spring of 2023, along with the remainder of the inmate population at the CNSCF, somewhat continuously experienced "particularly difficult and punitive pre-sentence custody conditions which go well

beyond the normal restrictions associated with pre-trial custody [and as such, it] is one of the factors to be taken into account in determining the appropriate sentence… [as] a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at the appropriate sentence from which the *R v Summers*… credit will be deducted… [however] it cannot justify the imposition of a sentence which is inappropriate having regard to all the relevant mitigating or aggravating factors."[13]

[91] However, I agree with the Crown that I should restrict my consideration of the basis for the mitigating effect of a "*Duncan*" credit, only to the 21 days that relate to the offences in issue here.

[92] Doing so, means LM experienced "particularly difficult and punitive presentence custody conditions" only for those 21 days.

[93] I further agree with the Crown that LM should not receive any remand credit during any portion of his remand when he is serving an unrelated sentence: *R. v. Wilson*, 2008 ONCA 510 at paras. 42-45 per Rosenberg JA; *R. v. Keepness*, 2014 SKCA 110 at paras. 70-77 per Ottenbreit, JA; *R. v. Roulette*, 2024 MBCA 28 at paras. 14-16 per Rivoalen CJM.

4 – Evidence / Representations made at the Sentencing Hearing[14]

[94] LM made representations that he had a medical prescription to address an ADHD diagnosis, which he suggested he has had throughout the time interval from his arrest on August 20, 2022, to the present day.[15]

[95] The Crown and Court have repeatedly dealt with LM in relation to the present offences, and he regularly asserted that his medication was not being provided to him. He argued that this caused his mental health to suffer, including that, without the medication in question, his mind was always "racing".

[96] LM also referenced not receiving medical attention quickly enough – in relation to his teeth which he said were in need of attention, and his physical condition as a result of incidents between inmates and/or staff resulting in injuries to him.

[97] It is the Nova Scotia Health Authority which is directly responsible for the records preparation of any medication related thereto in the Health Care Unit - whereas the distribution of the medication necessarily takes place within the confines of the cells area which falls within the jurisdiction of CNSCF.[16]

[98] The Court was also satisfied that, as a result of staff shortages at CNSCF, rehabilitative programming that would otherwise have been available (and which

is somewhat limited in any event) would not as regularly have been available to LM, if at all at times, throughout the time interval from August 20, 2022, to present day.

[99] The incidental effects of significantly greater than normal lockdown times at CNSCF, include that inmates in the general population would have had significantly decreased time out of cells in the dayrooms and the Airing Court.

[100] These effects consequently also limit inmates' ability to have telephone access with counsel, or friends and family, and their ability to regularly engage in hygiene-related activities.

[101] LM's comportment at the Sentencing Hearing (as it was at the pre-trial applications and conferences, and Trial) was disrespectful at times, and emotional at times. Some of this can be understood as reflecting his frustration with the conditions of his incarceration pending the resolution of this matter.

[102] More of concern is that he consistently made very inappropriate and unwarranted, derogatory and disparaging comments regarding the Crown Counsel(s), and at times the Court.

[103] From my repeated encounters with LM in relation to this matter, his comportment has remained consistent, suggesting it is a somewhat fixed attribute of his personality.

[104] At its core, LM's attitudes are best understood as reflecting his resistance to following the authority of the Court, and directions in Court orders, and ultimately to any serious willingness to attempt a rehabilitation.

[105] I am satisfied that based on all the evidence available, that any meaningful progress in the short to mid-term regarding LM's rehabilitation will be difficult to achieve.

[106] At this time, he is not seriously motivated to rehabilitate himself.

[107] For example, the Crown provided LM and the Court with a draft of conditions it proposed for a 24-month Probation Order.

[108] One of the conditions thereof was to attend for assessment and counselling regarding "substance abuse" i.e. alcohol abuse.

[109] When the Crown pointed out that its rationale was based upon his Criminal record, which seems regularly connected to alcohol abuse, LM readily admitted that to be the case.

[110] However, LM suggested he should not be on a Probation Order with the provision that he abstain from the possession and consumption of alcohol.

[111] He stated that, he is a "functioning alcoholic" and he enjoys consuming alcohol, and upon his release, he fully intends to continue to drink alcohol, as and when he pleases, in any event.

[112] Essentially, he argued that it was unfair to require him to abstain from alcohol, because it would criminalize conduct that itself *per se* is not criminal.

[113] On the other hand, he admitted that the vast majority of his criminal record offences involved him consuming alcohol.

[114] He similarly argued against a s. 743.21 CC Non-Communication Order, and specifically a "no contact" with MW and her children clause, in any Probation Order that might be ordered.

[115] When LM read his letter (into the Record), in an effort to receive the Court's permission to send it to MW and her children, and I have observed at other times in my contacts with him, that there was, as the Crown put it, "some remorse built in" to his perspective on what he has done, particularly as it relates to the children.[17]

C – The Crown Position on Sentencing

[116] In summary the Crown's position on sentence is:

The Crown seeks a period of incarceration, after taking into account the "totality" principle [which I understand also includes any potential *Summers* s. 719 CC pre-sentence remand credit, and a reasonable "*Duncan*" credit for particularly difficult and punitive conditions while LM was on remand] as follows:

(a) August 18, 2022, s. 266(a) CC - assault on IM -maximum sentence of 5 years imprisonment – 6 months;

(b) January 1 – 31, 2022, s. 266(a) CC– assault on MW - maximum sentence of 5 years imprisonment – 4 months consecutive;

(c) August 18, 2022, s. 264.1 CC - threats to MW - maximum sentence of 5 years imprisonment - 2 months concurrent;

(d) August 19, 2022, s. 335 CC - take a motor vehicle without consent - maximum sentence of 2 years less a day imprisonment and/or $5,000 fine per s. 787 CC - 2 months consecutive;18

(e) August 20, 2022, s. 129(a) – unlawfully and wilfully resisting arrest – maximum sentence of 2 years – 1 month consecutive

for a **total of 13 months imprisonment going forward**; to be followed by a period

of **2 years probation** (including that LM have no contact whatsoever direct or indirect with MW or her children).

[117] The Crown argues that the maximum credit LM can receive for his time on remand is for the 21 days between February 23 and May 1, 2023, equivalent at a 1.5:1 day in jail ratio to **32 days** *Summers* credit against his sentence of imprisonment going forward.

[118] The Orders it requests are:

1. 24 months Probation- a discretionary order pursuant to s. 731 CC;
2. DNA - a discretionary order pursuant to s. 487.051 CC (only for the secondary designated offences, being s. 266 and s. 264.1 CC);
3, Weapons Prohibition - a discretionary order pursuant to s. 110(2.1)(a) and/or (b) CC for LM's lifetime;
4. Non-Communication with MW and her children (IM and EM) pursuant to s. 743.21 CC "during the custodial period of the sentence, except in accordance with any condition specified in the order that the sentencing judge considers necessary."; and
5. Victim Surcharge - a mandatory order pursuant to s. 737 CC - unless exceptionally the order is not made, pursuant to ss. (2.1).[19]

D – LM's Position on Sentencing

[119] LM seeks the most lenient sentence possible given the circumstances of the offences and himself, and specifically rejects the need for a Probation Order (including a no contact clause with MW and her children, or an alcohol consumption and possession prohibition clause) and a Non-Communication Order per s. 743.21 CC.

[120] He also seeks the maximum credit for his time on remand (since August 20, 2022), and specifically has repeatedly drawn the Court's attention to the "lockdowns" which have deprived him in a material way on an ongoing basis of time out of his cell, which I understand him to therefore argue should be taken into account by the Court as a *Duncan* credit, in addition to the *Summers* credit per s. 719 CC for his time on remand <u>on these charges</u>.

E – What is a fit and proper sentence?[20]

[121] LM has a very extensive criminal record, which is often associated with the abuse of alcohol.

[122] According to his representations, which I somewhat skeptically accept as a

general statement, he also has a sporadic history of employment, as recently as at the time of these offences.

[123] I have concluded that, without rehabilitation, the risk of re-offending approaches much closer to a certainty, than not.

[124] Moreover, meaningful rehabilitative steps will be difficult to achieve.

[125] I reference a number of older sentencing decisions from our Courts, and recognize that many of those pre-date expanded existing, or entirely new, sentencing provisions, put into effect over time up until the present offences were committed (including by explicitly identifying further aggravating factors relevant to the sentencing herein – e.g. ss. 718.2(a), 718.201 CC), and a more modern understanding of the harms caused by such offences (e.g. intimate partner violence and "coercive control" driven criminal behaviours) in the jurisprudence.[21]

[126] The modernized view of the impacts of intimate partner violence bears some similarities to the modernized view of "sentencing" sexual abuse of children offences, as set out in the reasons of the Court in *R. v. Friesen*, 2020 SCC 9.

[127] To the extent that this is accurate, it suggests that older precedents may have not fully appreciated the breadth of intimate partner violence and harmful effects thereof on affected adults and children, and correspondingly under- estimated the deterrent value of the sentences that were typically meted out. This reasoning suggests that some of those older sentencing ranges may need to be increased for a modern equivalent set of factual circumstances.

1 – Range of Sentence / Comparator Sentencing Cases

[128] Ideally one would be able to precisely identify the appropriate range of sentence based on the offender and circumstances of this case.

[129] Comparator sentencing cases should involve similar offences, committed in similar circumstances, by similar offenders.

[130] As Justice Bateman stated in *R. v. Cromwell*, 2005 NSCA 137:

> [26] **Counsel for Ms. Cromwell says** this joint submission is within the range. He broadly defines **the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree.** In my opinion **the range** is not the minimum to maximum possibilities for the offence but **is narrowed by the context of the offence committed and the circumstances of the offender** (" . . . sentences imposed upon similar offenders for similar offences committed in similar circumstances . . ." *per* MacEachern, C.J.B.C. in *R. v. Mafi* (2000), 2000 BCCA 135 (CanLII), 142 C.C.C. (3d) 449 (C.A.)). **The actual punishment may vary**

> **on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public.** This variation creates the range.
>
> [My bolding added]

[131] LM has an extensive, continual criminal record dating from 1992, in which one finds a panoply of offences (property related; impaired / refusal to provide and dangerous driving; breaches of court orders or court process; assaults of various degrees and threats to persons).

[132] LM's criminal record is consistent with his statement that he has been for some time and remains an "alcoholic".

[133] There is no hint of remorse by LM, particularly towards MW.

[134] He is in need of significant rehabilitation and regarding intimate partner violence issues.

[135] During most of the continuity of his criminal record there are typically no more than two years between sentencing dates.

[136] He has been convicted in Prince Edward Island, Alberta, and Nova Scotia.

[137] He is not presently prepared to take any rehabilitative steps.

[138] He is not remorseful, which is necessary to effect significant rehabilitation.

[139] LM remains at a significant risk to re-offend at present.

[140] In the normal course, there are limited options for rehabilitation while serving a sentence in a Provincial Correctional Facility.

[141] Given the present shortages of staff in some Provincial Correctional Facilities, and the consequent lockdowns as recounted in decisions from this Court regarding *habeas corpus* applications, the rehabilitative programs that might have been available are reasonably expected to remain partially or significantly curtailed in the near future.

[142] Federal Correctional Facilities have significantly greater rehabilitative programming available.

[143] The offences here, directly or indirectly, involve intimate partner violence,.

[144] They each reflect LM's need to control those around him, and to not let himself be controlled by others.

[145] What cases are there, that involve all or some combination of: "similar offenders", "similar offences" and "committed in similar circumstances"?[22]

[146] In relation to intimate partner violence, Judge Gorman's reasons in *R. v. SS*, [2021] NJ No. 340, are helpful.

[147] Mr. S committed a violent and prolonged assault upon a former intimate partner causing multiple injuries to her.

[148] As Judge Gorman recounted at paragraph 50:

> Mr. S assaulted his former partner by striking her arms; grabbing her face with his hand and forcing her to look at him by squeezing her cheeks; pushing her on to a couch and hitting her on the top of her head; placing his hand on her throat and squeezing it; and by pushing her on to the floor and striking her legs. These assaults caused significant bruising to numerous portions of Ms. S's body.

[149] He was 29 years of age and had no prior convictions. The two were married in January 2020 and have a child who is 34 months of age. However, as a recent immigrant, any sentence for an offence of "serious criminality" or one where "a term of imprisonment of at least six months" is imposed, pursuant to section 64 of the *Immigration and Refugee Protection Act*, such conviction may place him in jeopardy of removal from the country."

[150] Regarding "sentencing in intimate violence cases" he stated:

> Sentencing in Intimate Violence Cases:
>
> [5] In *R. v. Pike*, [2018] N.J. No. 31 (P.C.), **Judge Porter indicated that "[c]rimes of violence against women in domestic relationships require denunciatory sentences" (at paragraph 28). I agree. The question is why are such sentences required?**
>
> [6] **The answer lies in understanding that violence or threats of violence in intimate relationships is of very different nature than such offences committed in other contexts.** In the intimate relationship context, the realities of escalation of violence and the killing of female partners are well known.
>
> [7] The Sentencing Council for England and Wales in its report, *Overarching Principles: Domestic Abuse Definitive Guideline*, 2018, noted that in assessing the seriousness of offences involving domestic abuse, courts should recognize that the "domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship. Additionally, there may be a continuing threat to the victim's safety, and in the worst cases a threat to their life or the lives of others around them."
>
> [8] The Sentencing Council pointed out that the domestic abuse "is likely to become increasingly frequent and more serious the longer it continues and may result in death. Domestic abuse can inflict lasting trauma on victims and their extended families, especially children and young people who either witness the abuse or are aware of it having occurred. Domestic abuse is rarely a one-off incident and it is the cumulative and interlinked physical, psychological, sexual, emotional or financial abuse that has a particularly damaging effect on the victims and those around them."

[9] In *R. v. Alcorn*, 2021 MBCA 101, in the context of an appeal of sentence in a child prostitution case, the Manitoba Court of Appeal indicated that "[i]n order to better legally protect children, it is necessary to turn a new page from the past and embark on a fresh sentencing approach which focusses on greater offender accountability through increased sentences" (at page 1). **I would suggest that the turning of new page from the past in relation to our approach to sentencing for offences involving violence in intimate relationships is also required.**

[10] **This does not mean that the imposition of a period of incarceration will be appropriate in every case regardless of the circumstances** (see for instance *R. v. Morgan*, [2021] N.J. No. 275 (P.C.), and *R. v. Pickett*, [2021] N.J. No. 137 (P.C.)), **but it does mean that sentences imposed for such offences must not only reflect the inherent seriousness of these offences, but they must also include an element that seeks to provide meaningful future protection for the victims of such offences. For instance, the use of maximum periods of probation, lengthy firearm prohibitions, banishment and the use of electronic monitoring, must be considered and utilized where appropriate.**

My Decision:

[11] I have concluded that this is an appropriate case for the imposition of a period of s**ix months of incarceration, less a day, followed by two years of probation. I have concluded that this is an appropriate sentence because of the seriousness of the assault, the injuries inflicted, and because the assault took place in the context of an intimate relationship. I have also considered that Mr. S has no prior convictions and that there are possible immigration consequences for him** because of the conviction entered and the sentence imposed.

[My bolding added]

[151] Judge Gorman went on to state:

The Principles of Sentencing:

[62] In *R. v. Knott*, 2012 SCC 42, it was held that "the purpose and principles of sentencing set out in the *Criminal Code* are meant to take into account the correctional imperative of sentence individualization" (at paragraph 47). *In R. v. Suter*, 2018 SCC 34 (CanLII), [2018] 2 S.C.R. 496, the Supreme Court of Canada indicated that sentencing "is a highly individualized process. A delicate balancing of the various sentencing principles and objectives is called for, in line with the overriding principle that a 'sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender'" (at paragraph 4). Similarly, in *R. v. Boudreault*, 2018 SCC 58, the Supreme Court of Canada indicated that "sentencing is first and foremost an individualized exercise, which balances the various goals of sentencing, while taking into account the particular circumstances of the offender as well as the nature and number of his or her crimes" (at paragraph 58).

The Fundamental Purpose of Sentencing:

[63] Section 718 of the *Criminal Code* states that the "fundamental purpose of sentencing is to protect society and to contribute...to respect for the law and the maintenance of a just, peaceful, and safe society." This is to be achieved by

imposing sentences that have, among other objectives, the objectives of:

> -separating offenders from society, where necessary;
>
> -denouncing unlawful conduct;
>
> -general deterrence;
>
> -rehabilitation; and
>
> -the promoting of a "sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community."

…

Offences Against Intimate Partners:

[68] Section 718.201 of the *Criminal Code* indicates that a court that "imposes sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims…"

[69] In addition, section 718.2(a)(ii) of the *Criminal Code* states that if an offence involves the abuse of an intimate partner, this is to be considered an aggravating factor in sentencing:

> A court that imposes sentence shall also take into consideration the following principles
>
> (a) a sentence should be increased or reduced for any relevant aggravating or mitigating circumstance relating to the offence of the offender, and without limiting the generality of the forgoing,
>
> (iii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim' or the offender's family, shall be deemed to be aggravating circumstances.

…

[71] In *R. v. Butcher*, 2020 NSCA 50, the Nova Scotia Court of Appeal indicated that "Parliament's inclusion of domestic violence as an aggravating factor on sentencing codified what the common law already took into account. **Whether it is through the application of statutory or common law principles, violence perpetrated in the context of intimate relationships requires emphatic denunciation**" (at paragraph 136).

…

A Summary:

[105] These presents illustrate that for assault offences committed in intimate relationships, periods of imprisonmnet [*sic*] are regularly imposed. This year, the range of imprisonment has extended from sixty days to six months.

[106] The assault committed by Mr. S upon Ms. S is more serious than what occurred in *Best* (nine months of imprisonment imposed); *Manning* (six months of imprisonment imposed); *Stacey* (ninety days of imprisonment imposed); and *Piercy* (ninety days of imprisonment imposed). What occurred here, has some similarity to what occurred in *Stewart* (five months of imprisonment imposed); *Brown* (six months of imprisonment imposed); and *Watkins* (five months of imprisonment imposed).

…

Conclusion:

[113] **The primary sentencing principles that I must stress in this case are deterrence and denunciation**. The sentence imposed must not only reflect the seriousness of the assault that occurred, but the seriousness of assaults in intimate relationships. However, I must also consider that **Mr. S has no prior convictions and that the sentence I impose may have significant collateral consequences for him.**

[114] Based upon the circumstances of the offence, including the harm caused to the victim, and considering the circumstances of the accused as well as the sentencing principles and precedents referred to, I conclude that **an appropriate sentence in this case is a period of six months of imprisonment**. I have reduced this to six months less a day as a result of section 64(2) of the *Immigration and Refugee Protection Act*.

…

[124] In this case, I conclude that a conditional period of imprisonment is not capable of satisfying the principles of sentencing that ought to be given priority nor would it reflect the seriousness of the offence committed by Mr. S. **Assaults in intimate relationships are crimes of depressingly common occurrence.** The sentencing principles of deterrence and denunciation must be stressed. In this case, a conditional period of imprisonment, because of the seriousness of the assault, would fail to satisfy those principles of sentencing.

[125] For these reasons, the period of imprisonment imposed will be ordered to be served in Her Majesty's Penitentiary.

A Period of Probation:

[126] I have also concluded that a period of probation should be imposed. **I have concluded that a period of two years of probation is appropriate so as to provide Ms. S with a lengthy period in which Mr. S will be prohibited from having contact with her**. I have considered imposing a weapon prohibition pursuant to section 732.1(d), but as will be seen, I have done so pursuant to section 110 of the *Criminal Code.*

[My bolding added]

[152] In Nova Scotia, we have the recent findings of the Mass Casualty Commission.

[153] Intimate partner violence and "coercive control" figured prominently in those circumstances.

[154] As His Honour, Judge Shane Russell observed in *R. v. S.R.M.*, 2023 NSPC 33, albeit it, in distinguishable circumstances:

> [2] The complexity and sad reality that is Intimate Partner Violence ("IPV") can hardly be captured in words. The injuries, shame, trauma, and oppression, occur in real time far removed from lawyers and judges at sentencing hearings. The deep-rooted impact of this violence can set in and take hold well before and long

> after a sentencing hearing. Intimate Partner Violence is someone's sister, someone's child, someone's granddaughter, someone's brother. Intimate Partner Violence chills, infects, and decays the mental health and wellness of our communities.
> [3] This year the Mass Casualty Commission released a report entitled Turning the Tide Together. The Commission examined what has been referred to as an "Epidemic of gender based, Intimate Partner, and Family violence". The Commission stated:
>
> > In 2023, we use "epidemic" to underscore the fact that gender-based, intimate partner, and family violence continue to be exces-sively prevalent in Nova Scotia and throughout Canada. Although being experi-enced by all genders, these forms of violence affect a disproportionately large number of women and girls (page 274).
> >
> > ……
> >
> > Focusing on Statistics Canada data on intimate partner violence, we point out that more than 11 million people, the overwhelming majority of whom were women, have experienced intimate part-ner violence at least once in their life from the age of 15 on. It is important to pause and pay attention. About one out of three adults has experienced this form of vio-lence. These statistics are not just numbers. They represent the lived experiences of real people – of everyday life for far too many women and girls (page 275).

[155] I have repeatedly had experience with LM since April 2023 generally, and specifically during the pre-trial applications heard by me, and during the trial and sentencing processes.

[156] MW and LM were together from approximately November 2021 until August 2022.

[157] From what I have seen and heard, I am satisfied more likely than not that LM's attitude and behaviour between those dates suggest that the relationship was fraught by his exercise of coercive control and has been shown to exhibit characteristics of intimate partner violence.

[158] Our jurisprudence also has echoed the need, primarily, for deterrence in relation to intimate partner violence, including that towards children.

[159] Let me set out some of the jurisprudence I have located from Nova Scotia, in an effort to hone in on a range of sentences for the offences at issue here. (My bolding added throughout).

1 – *R. v. Gray*, [1987] NSJ No. 216 (Co.Ct.)[23]

> The circumstances surrounding the offence as related by Crown Counsel to the presiding Judge, can be summarized as follows: Gray is 33 years old, with a grade 9 education, he has a problem with overindulgence in liquor, and in the early 70's had several violence related convictions, the last being a 1974 assault on a police

officer. At the time of the offence he had been living in a common-law relationship with Isabel Roach for over two years.

At approximately 4:48 a.m. on January 1st, 1987, the R.C.M.P. received a call from Roach requesting aid, and alleging she had been assaulted by Gray. Both Gray and Roach were present at a New Year's Eve party in the River John area. At that time Gray, as a result of an argument outside the house in which the party was being held, smashed Roach's head a number of times. She waited in a truck until Gray fell asleep, at which time she telephoned her daughter, and left the party with a group. She stated Gray had been drinking extensively that evening. A short time later, in the trailer she shared with Gray, she was again hit quite hard in the face by Gray several times. She received a laceration behind one ear as a result of Gray grabbing her by the ears and pulling on them.

…

Further, **Gray's Counsel** reviews the various cases cited by Crown Counsel, and distinguishes them from the factual situation herein. It is **submitted that the charge itself, being simple assault punishable on summary conviction rather than assault causing bodily harm, is a circumstance that mitigates against a custodial sentence.**

In *R. v. Cowell*, Clarke, C.J.N.S., after referring to the well-known case of *R. v. Grady* (1971) 5 N.S.R. (2d), 264, reviewed five cases considered by the Nova Scotia courts in the period from 1981 to 1985, all involving violence by an offender against another person. The sentences imposed ranged from six months to two and a half years.

In *R. v. Publicover*, the situation was somewhat similar to the circumstances in the present case. The same submissions as to drunkenness and the unfaithfulness of the wife were raised in defence, and as mitigating factors. MacDonald, J.A., in delivering the decision of the Appeal Court, said at page 24:

> "We do not agree. In our opinion, there was absolutely no justification for this type of conduct and the actions of the appellant must be strictly sanctioned. **Incidents of wife-beating appear to be more prevalent in our society than at one time believed. The courts have an obligation to show society's denunciation of such conduct by the imposition of sentences that primarily emphasize the element of general deterrence**."

…

There appears to be an ever growing number of cases of assault by men against their wives or common-law spouses. The Appeal Court of this Province has shown in numerous cases that this is considered a serious offence, requiring a custodial sentence. Deterrence not only to the offender, but to the general public must be emphasized over the possibility of rehabilitation. The present instance is a prime example of a continuing flagrant assault upon a defenceless woman, which but for the intervention of third parties may have led to grave injuries to the victim. Provocation is no excuse for such a cowardly attack on a woman. The physical oppression of women by the tactics used by Gray must be stamped out by the strongest penalties possible under the law.

…

I allow the Appeal, and under the provisions of Section 614 of the *Criminal Code* of Canada, **vary the sentence to one of five months imprisonment** in the Colchester County Correctional Centre.

MacDONNELL CO. CT. J.

[My bolding added]

2 – *R. v. Ayles,* [1989] NSJ. No. 313 (CA)

[160] The headnote reads:

This was an appeal by the accused from the sentence imposed following his conviction for indictable assault. The accused grabbed his wife by the neck and punched her in the nose while on the street. He was charged with assault and released on bail on his assurance that he would stay away from his wife and would not consume alcohol. **A few weeks later he forced his way into the wife's home while drunk and assaulted her in front of their children**. The accused had an extensive criminal record. The Crown proceeded summarily on the first assault and by way of indictment on the second. **He was found guilty of both charges and sentenced to two months' imprisonment for the first offence and ten months' imprisonment to be served consecutively on the second. The accused appealed the sentence on the second conviction.**

HELD: The appeal was dismissed.

The sentence was fit and proper for the serious crime involved.

[My bolding added]

3 – *R. v. Lynch,* [1989] NSJ No. 351 (CA)

[161] **1** BY THE COURT: Appeal against conviction for assault causing bodily harm dismissed, **leave to appeal against sentence refused, cross-appeal against sentence allowed and sentence increased** per reasons for judgment of Clarke C.J.N.S., Matthews and Chipman, JJ.A. concurring.

[162] CLARKE C.J.N.S.

2 The appellant appeals from his conviction for assault causing bodily harm to Cathy Lynch, contrary to s. 267 (1)(b) of the Criminal Code. He also seeks leave to appeal, and if granted, appeals from his sentence of six months for this violation. The Crown cross-appeals, and applies for leave to appeal against sentence, contending that it is unreasonable and cannot be supported by the evidence and therefore, should be increased.

3 The offence occurred at Amherst during the morning of January 27, 1989. After the appellant and Mrs. Lynch were divorced in 1986, they continued their relationship on an irregular basis. They were living together with their two children in her apartment when the acts of violence giving rise to this offence happened.

4 An animated argument involving much shouting developed during the morning.

Both were drinking at the time. Cathy Lynch alleges it was brought on by her informing the appellant that she was terminating their relationship and he must leave the premises. The appellant says the argument started when he made allegations about her infidelity.

5 The evidence of Cathy Lynch is that when she tried to leave the apartment the appellant grabbed her, threw her down on the couch and slapped her several times. Then he threw her on the floor, pinned her down with his knee on her chest, and used her hand to strike her nose causing it to "crunch". The appellant pulled her up from the floor and slammed her head against the wall three or four times. She got out of the apartment and, from a nearby house, telephoned the Transition House in Amherst. Workers from the House came and took her to the police station to lay the complaint and then to the emergency unit at the hospital. Her examination at the hospital disclosed that she had a broken bone in her nose, of recent origin, and haemorrhaging and tenderness in the neck and surrounding area of her scalp. A medical doctor testified that considerable trauma or force was required to fracture the bridge of Mrs. Lynch's nose.

…

12 The appellant argues his sentence of six months is excessive. The Crown contends it is inadequate. By s. 687 (1) of the *Criminal Code* it is the function of this court to "consider the fitness of the sentence appealed against".

13 The appellant is 32 years old with a grade 10 education. His employment record has been sporadic. He last obtained regular employment in April 1989.

14 His criminal record is not good. Between 1974 and 1978 he was convicted on two charges of theft under $ 200.00, eight charges of false pretences, abduction of a female, indecent assault on a female, indecent act in a public place, theft over $ 200.00 and break, enter and theft. Thereafter he did not run afoul of the law until **1985 when he was convicted of assaulting the complainant, Cathy Lynch. Again in 1988 he was convicted of assault causing bodily harm to Mrs. Lynch and now, the appellant stands convicted for a third time.** While it may be argued that after 1978 he showed some improvement from his experiences with the law, his more recent action in relation to Mrs. Lynch cannot be condoned or overlooked. The appellant obviously has not learned that it is a serious offence to assault a woman and cause her bodily harm. The serious nature of the offence is indicated by the fact that it carries a maximum penalty of ten years imprisonment. It is evident that probation and fines for the earlier assaults on Mrs. Lynch offered no deterrence to the appellant from repeating his violence toward her.

15 The prior convictions for abduction of a female and indecent assault on a female and the three more recent assaults on Mrs. Lynch indicate **the appellant has a serious pattern of violent behaviour toward women.** In such crimes, the courts cannot be expected to be lenient. Mr. Justice Macdonald, of this court, stated in *R. v. Publicover* (1986) 74 (2d) N.S.R. 23 at p. 24:

> The courts have an obligation to show society's denunciation of such conduct by the imposition of sentences that primarily emphasize the element of general deterrence.

16 While **the trial judge** at the time of sentencing considered the need for deterrence, both general and specific, he **erred, with respect, by failing to place sufficient emphasis upon the violent nature of this assault and the fact that**

the previous attempts of the courts to deter the appellant from becoming a repeat offender had obviously failed. In that respect the trial judge imposed a sentence that was inadequate for the circumstances and it should now be varied upward to twelve months imprisonment.

17 I would dismiss the appellant's appeal against conviction and refuse his application for leave to appeal against sentence. **I would** grant the respondent leave to cross-appeal against sentence and **allow the appeal by increasing the sentence, as already noted, to twelve months imprisonment**, less credit for time already served on the sentence.

CLARKE C.J.N.S.
Concurred in:
MATTHEWS J.A.
CHIPMAN J.A.

4 – *R. v. Girvan,* [1991] NSJ No. 497 (CA)

[My bolding added]

HART J.A. (orally)This is an application for leave to appeal and if granted, an appeal against **a sentence of one year's imprisonment and two years' probation** imposed upon the appellant by the Honourable Hugh J. MacDonnell, additional Judge of the County Court of District Number Two, **after convicting the appellant that he did knowingly utter a threat to Kathy Thornhill by saying "It's William, smart thing you tried but I'll kill you yet", contrary to section 264.1 of the Criminal Code.**

1 The appellant and Kathy Thornhill lived together, and a child was born on December 23, 1987. They then separated and custody of their son was awarded to the mother. During the next two years there was a continuous battle over visiting rights.

2 **On May 23, 1990, the appellant assaulted Kathy Thornhill during** an argument which occurred when the son was being returned to the mother. **He was convicted and fined $500.00**.

3 **On July 13, 1990, a similar assault occurred for which the appellant was convicted and fined $350.00**.

4 **The death threat was made on July 18, 1990.**

5 According to the trial judge, the appellant refused to admit his responsibility for any of these offences and showed no remorse. He canvassed the case law and appears to have based the sentence on proper principles of sentencing.

6 **All courts in this Country have in recent years very properly condemned assaults and threats against women by men displaying the temperament of this appellant.**

7 We are unable to say that the sentence imposed was not a fit one under all of the circumstances and although we grant leave, we dismiss the appeal.

HART J.A.
Concurred in:
CLARKE C.J.N.S.
MATTHEWS J.A.

5 – *R. v. Coleman*, [1992] NSJ No. 84 (CA) [My bolding added]

1 The respondent was charged with aggravated assault. **Following the testimony of medical witnesses called by the Crown the respondent pleaded guilty**. The learned **trial judge imposed an intermittent sentence of 90 days to be followed by 2 years probation with the condition that he take counselling for substance abuse as recommended by the probation service**. The Crown has applied for leave and, if granted, appeals the sentence as being manifestly inadequate to reflect the element of deterrence. **The facts are set out in the appellant's factum**:

> "On the evening of September 10, 1990, **the victim was attending a function at the Halifax World Trade and Convention Centre. The accused arrived at the reception late in the evening. They had been residing together for about a year. They were drinking and arguing**. They left and walked to a park across from the CBC building at the Corner of the Bell Road and Trollop Street, Halifax. The argument continued. **The accused called the victim a "slut" and she slapped his face. The accused punched the victim in the face, rendering her unconscious, and he continued to beat her about the face. She fell from her seated position on a bench** and a witness saw the accused kicking the complainant. The kicking has been denied by the Defence. A young man came to the aid of the victim and the accused assaulted him. This witness kept the accused separate from the victim until the police arrived.
>
> **The victim was taken to the hospital where it was determined that she had a fracture of the orbit of the left eye, a fractured nose and abrasions to her chest. Two operations under general anaesthesia were required to repair the eye, and the procedure included grafting skin from her ear. Apparently the injuries will not produce lasting effects."**

2 **As to the facts, the respondent states**:

> "The Respondent admits the facts as set out in the Appellant's Factum and **wishes to add that when the victim slapped the Respondent this resulted in visible red marks on the Respondent's face the next day. When the assault was over the Respondent immediately regretted his actions and kept going back over to the victim saying he loved her prior to the police showing up**."

3 The respondent is **21 years of age** and a member of the Halifax Longshoreman's Association. He has **a good work record**. He has **a criminal record**:

> August, 1988 - Impaired Driving
> December, 1989 - Mischief
> June, 1989 - Assault
> June, 1989 - Assault causing bodily harm, unlawful possession of a weapon and causing a disturbance.

4 **These convictions were in the Youth Court. In each case he was fined**. With respect to the last offence a probation order was also made which required his attendance at a Drug Dependency Clinic and abstinence from the use of alcohol. **This condition was imposed in an attempt to assist him in the control of his temper and alcoholism**.

5 The Sentence Hearing was held on June 19th, 1991. The sentencing judge had before him a Pre-Sentence Report which states that the respondent advised the writer of the Report that **he had stopped using alcohol in January, 1991**. The Report concludes with the following remarks:

> "He impressed, however, as trying to minimize the nature of the offence and denied any substance abuse difficulties. Nova Scotia Correctional Services files, however, indicate that he has served a one year term of probation for several criminal matters, one of which was similar in nature. He was also assessed at the Metro Drug Dependency Clinic in 1989 and at that time Mr. Hall, Clinical Therapist, believed the offender to have a definite "temper" problem and possible substance abuse difficulty. It appears, however, that Mr. Coleman was unwilling to cease his consumption of alcohol at the time.
>
> It is this writer's opinion that the offender could benefit from attendance both at a metro drug dependency clinic for assessment and possible treatment and counselling for anger management along with any other disposition imposed by the courts."

6 **The respondent has a temper and a propensity for violence, particularly when drinking**.

7 The learned trial judge considered the appropriate principles of sentencing. However, **the sentence is manifestly inadequate considering the circumstances of the assault and the offender's propensity for violence. The learned trial judge did not give sufficient consideration to the element of deterrence. The fact that the offence took place while the respondent was intoxicated is not a mitigating factor**. The fact that his girlfriend had slapped him cannot excuse the violence with which he assaulted her. It is all too easy for a man to assault a woman; there is ample evidence that such assaults are prevalent in our society. Sentences must adequately reflect the need to deter this offender and others with a propensity for such conduct. The respondent's record for violence clearly indicates a need to deter him. His efforts in the past towards rehabilitation with respect to his drinking have been half-hearted with the possible exception of the period while he was awaiting sentence in relation to this aggravated assault. The possibility that the court would impose a substantial period of incarceration no doubt caught his attention and motivated a new attempt to curb his drinking.

8 I have reviewed the sentence imposed in the following assault cases involving serious injuries to the victims: *R. v. Silvea*, 86 N.S.R. (2d) 346 (N.S.C.A.); *R. v. Sheppard*, 81 N.S.R. (2d) 258 (N.S.C.A.); R. v. Carvery, 99 N.S.R. (2d) 194 (N.S.C.A.); *R. v. Dzikowski*, 99 N.S.R. (2d) 362; *R. v. Bourgeois*, 29 N.S.R. (2d) 596 (N.S.C.A.); *R. v. Murphy*, 71 N.S.R. (2d) 265 (N.S.C.A.); *R. v. Spurgeon*, 76 N.S.R. (2d) 331 (N.S.C.A.); R. v. C.D.N., 100 N.S.R. (2d) 4; *R. v. Thompson*, 99 N.S.R. (2d) 188 (N.S.C.A.); *R. v. Lynch*, 94 N.S.R. (2d) 56 (N.S.C.A.); *R. v.*

Ayles, 92 N.S.R. (2d) 448 (N.S.C.A.); *R. v. Brun*, 81 N.S.R. (2d) 384 (N.S.C.A.); *R. v. Durst*, 79 N.S.R. (2d) 5 (N.S.C.A.); *R. v. Publicover*, 74 N.S.R. (2d) 23 (N.S.C.A.); *R. v. Cowell*, 72 N.S.R. (2d) 150 (N.S.C.A.); *R. v. Delaney*, 50 N.S.R. (2d) 693 (N.S.C.A.); *R. v. Landry*, 46 N.S.R. (2d) 88 (N.S.C.A.); *R. v. Herritt*, 36 N.S.R. (2d) 700 (N.S.C.A.); and *R. v. Chaisson*, 11 N.S.R. (2d) 170 (N.S.C.A.).

9 We were referred to these cases by counsel for the appellant. **I agree with his summation**:

> "**In summary, the principal thrust of these cases is to indicate that general deterrence requires a significant period of incarceration in a provincial institution.**"

10 Intermittent sentences are a very useful sentencing tool, particularly if an offender's employment is proven to be at risk by incarceration for a period of straight time. However, if the circumstances of the offence and the offender warrant a period of incarceration that cannot be accommodated by an intermittent sentence then the imposition of such a sentence cannot be justified. This is such a case. With respect, I cannot agree with the trial judge's assessment of what was a fit sentence for him to have imposed. While an appeal court is reluctant to vary sentences recognizing that a trial judge must be given some scope and has the advantage of eye to eye contact with the offender, an advantage usually denied the appeal court, there must be a recognition by sentencing judges that certain types of offences require sentences that stress deterrence even though the trial judge would rather focus on the element of rehabilitation and "give an offender a break". **So long as there is a prevalence of crimes of violence and, in particular, violence by men against the physically weaker members of our society (generally children, the elderly and women) and where serious injuries result, sentences must be such that deterrence is the primary consideration rather than rehabilitation in achieving the objective of protecting the public. There will, of course, be exceptional cases such as *Sheppard*.**

11 This was a violent assault on a young woman by a young man with a known propensity for violence. Her injuries were serious. It is apparent that the fines imposed on the respondent for his previous convictions for assault offences have not had the desired deterrent effect. The sentence imposed for the offence was manifestly inadequate.

12 **In my opinion a fit sentence requires that the respondent serve a period of 12 months in a provincial institution to be followed by one year probation** on the same terms as imposed by the trial judge. As the respondent pleaded guilty to aggravated assault and had a previous conviction for assault causing bodily harm, an order should issue, to be in force for a period of 10 years from the date of his release from imprisonment, prohibiting the respondent from having in his possession any firearm, ammunition or explosive substance. The order is made pursuant to section 100(1) of the Criminal Code.

6 – *R. v. Wiswell*, [1992] NSJ No. 135 (CA)

[My bolding added]

[163] The headnote reads:

Appeals from conviction and sentences imposed on various charges. After an argument the appellant physically assaulted his wife. The wife went into a neighbour's house where she called the police. The police decided to apprehend the appellant immediately without warning, even though it was 3:00 a.m. in the morning. The appellant had a hearing problem. He was woken by the barking of the dog that slept with him in his bedroom. He took up his rifle and put a chair behind the door. The police stormed the bedroom and the appellant's firearm was discharged in the process. He claimed it was accidental. **The trial judge found the appellant guilty of assaulting his wife and causing bodily harm and sentenced him to 18 months imprisonment; 9 months concurrent for threatening to kill her**; and a term of 18 months consecutive for discharging a firearm at the police. The appellant appealed the convictions and sentences.

HELD: Appeal allowed in part.

The conviction for **assault of his wife** would be upheld but the **sentence was reduced to 12 months**. The trial judge did not properly assess the evidence regarding the discharge of the firearm, particularly as to whether the discharge was intentional or accidental given the circumstances. Accordingly, a new trial would be ordered on that charge.

7 – *R. v. Leger*, [1997] NSJ No. 245 (CA)

[164] The headnote reads:

This was an appeal by the accused from sentence. **The accused pleaded guilty to 12 charges, two of which involved serious spousal assaults, and one of which was assault causing bodily harm**. The accused had 59 previous convictions, several of which were in respect of crimes of violence. The trial judge imposed a total sentence of four years imprisonment. The accused submitted that the sentence was harsh and excessive.

HELD: Appeal dismissed.

The trial judge considered all the relevant facts and applied the proper principles. It could not be said that the sentence was excessive in the circumstances.

FLINN J.A.

1 The appellant applies to this Court for leave, and, if granted, to appeal a sentence of four years imprisonment imposed upon him by Judge Cole of the Provincial Court. He claims the sentence is harsh and excessive.

2 On January 9th, 1997, **the appellant pleaded guilty to twelve charges contained in four separate Informations. The two most serious charges involve spousal assault. He pleaded guilty to assaulting his common-law wife on April 27th, 1996, and to assault causing bodily harm, also with respect to his common-law wife on July 6th, 1996. With respect to the other charges, two were for driving a motor vehicle while disqualified, one was for wilful damage to property, three were for threatening to cause serious bodily harm to his common-law wife, one was for uttering a threat to blow up his common-law wife's car, two were for failing to comply with a probation order, and one was for failing to appear on the date set for his trial.**

3 The **circumstances of the first assault charge** were described by the Crown to the trial judge as follows::

> ...**Ms. Noiles stated that she had just been severely beaten by her common-law husband, Mr. Leger, just outside the club. He had pinned her inside the vehicle and was punching her and punching -- punching her and kicking her in the face. He also had his hands around her neck and was choking her and saying that he would kill her. He finally stopped and then he stated that he was going to take her to the woods and kill her there**. Noiles was able to free herself from Leger and went into the club to call for the police and Leger fled on foot. Prior to this assault on Noiles, he had assaulted a patron inside the club and he had kicked and broken a side window and windshield of Noiles's vehicle. **The following morning, being April 28th, Leger contacted Noiles by phone where she spent the night with a friend to find out if she had laid any charges against him. She had indicated that she had called police and Mr. Leger was furious and stated to her that he was going to blow up her car. He would go to Nova Scotia and he would burn her trailer . . . .**

4 The Crown described **the circumstances of the charge of assault causing bodily harm as follows**:

> Mr. Leger and Ms. Noiles had gone out to Teasers Bar. They had consumed a quantity of draft beer. Mr. Leger started to become agitated with Ms. Noiles and, therefore, she left the bar and she went to the residence of a friend, a Ms. Julia Maloney. Mr. Leger followed her there. They had coffee and spoke for a bit and then they both left at approximately nine p.m. **A few minutes after they arrived at Ms. Noiles trailer, Mr. Leger grabbed her by the hair and he punched her in the right eye. He then grabbed her by the neck and was choking her. Mr. Noiles -- Ms. Noiles told Leger that he was killing her and he replied, that's the plan**. While he was holding her by the neck, he grabbed a glass lamp and he smashed it against the wall. **Ms. Noiles managed to get free and Leger was then -- began throwing broken pieces of the glass at her. He then, again, grabbed her by the hair, ah, pushed her down and he had a piece of broken glass in his hand. Ms. Noiles was partially conscious at this time and she believes that he was slashing at her throat**.
>
> Shortly after this, she found herself **bleeding down both sides of her neck and face** and at this time, ah, Ms. Noiles advised Leger that she was cut and he replied, so, I'm going to piss in your mouth and jerk off in your mouth. Ah, Ms. Noiles asked Mr. Leger if she could have a cigarette. He replied that she could put a towel on her head, and he let her up. **She then ran from the residence** and then Mr. Leger chased her outside the residence, ah, and **she was caught by him in the yard and then he, again, started to punch her, ah, out in front of the residence. At this time, the police arrived** .....

…

6 As a result of the **second assault, the appellant's common-law wife had a cut on her head, a swollen right eye, bruises on her neck and arms, and a scratch on her right breast, approximately four inches long**.

7 The appellant has a **lengthy criminal record** which was before the trial judge.

Prior to the convictions which give rise to this appeal, the appellant was convicted of **59 other offences**. His record includes **four convictions for assault causing bodily harm, seven convictions for assault, seven convictions for threats or intimidation, two weapons convictions and eight offences of driving a motor vehicle while disqualified**.

8 **The trial judge sentenced the appellant to a term of imprisonment of three years with respect to the charge of assault causing bodily harm, and to a period of six months imprisonment, to be served consecutively, with respect to the charge of assault**. With respect to the remaining ten charges the appellant was sentenced to six months imprisonment on each charge, to be served concurrently to one another, but consecutive to the six-month sentence for the charge of assault.

8 – *R. v. C.V.M.*, [2003] NSJ No. 99 (CA)

[165] The headnote reads:

Appeal by the Crown from the conditional sentence of two years less a day imposed on the respondent CVM after **he pleaded guilty to aggravated assault**. In a drunken rage, **CVM had severely beaten his common-law wife using a clothes iron and a wine bottle as weapons**. The attack was unprovoked. **On a previous occasion, CVM had been convicted of assaulting the wife with a weapon**. An assessment concluded that CVM's violent response pattern was in the high risk or severe problem range. **CVM had been receiving alcohol addiction and anger management counselling**. He continued to cohabit with the wife, who supported a conditional sentence. The sentencing judge did not expressly address the requirement that a conditional sentence would not endanger the safety of the community.

HELD: Appeal allowed.

The sentence was varied to a term of imprisonment of 22 months, followed by probation for three years. The sentencing judge erred in imposing a conditional sentence.

49 **Having found that a conditional sentence was not available here, it remains to fix the term of incarceration**. A person who commits aggravated assault, wounds, maims, disfigures or endangers the life of the victim. Aggravated assault carries a greater penalty than does assault with a weapon, the crime for which Mr. C.V.M. was previously convicted, and reflects an increased level of violence over his earlier crime.

50 As in all sentencing decisions, we must consider mitigating and aggravating factors. Mr. C.V.M.'s guilty plea is a mitigating factor. His expression of remorse, however, rings hollow in the case of this second assault upon the same victim. Nor am I satisfied that Mr. C.V.M.'s addiction to alcohol should mitigate on this second offence. Indeed, I would consider the fact of Mr. C.V.M.'s intoxication an aggravating factor here. He was, as a result of the first conviction, introduced to the support services necessary to deal with his addiction. At that point, if not before, **he was well aware of the dangers associated with his abuse of alcohol. He has not taken sustained advantage of those services, as a consequence of which he has re-offended**.

51 Amendments to the Criminal Code in 1997 clarify that abuse of a spouse is an aggravating factor that should increase the sentence above what it would otherwise be.

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> . . .
>
> > (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner or child,
> >
> > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, ...

52 **That this is a second spousal assault upon the same victim is a significant aggravating factor**. As has already been mentioned, **the nature of this crime calls out for denunciation and general deterrence**. Specific deterrence is required, here, as well.

53 As mentioned above, Mr. C.V.M. was fined for breaching the conditions of his earlier sentence. The particulars were not available at time of sentencing. Counsel agreed at the hearing of this matter that, should this court conclude that the sentence must be overturned, it would be appropriate for us, in substituting a fit sentence, to consider the circumstances of that previous breach. Mr. C.V.M. was sentenced on February 12, 1997 to a six month conditional sentence followed by a period of probation. The offence to which he pleaded guilty and was fined was breaching the terms of his probation by consuming alcohol on August 31of that same year. Clearly, Mr. C.V.M.'s abstention from alcohol was a key term of the probation order. I consider this past breach to be an additional aggravating factor.

54 As is the custom, I would grant a two-month credit for the one month served on remand. After allowance of that credit, **I am satisfied that the appropriate sentence for this offence is a term of imprisonment of twenty-two months followed by three years probation**. (See, for example, *R. v. Brown (B.J.)* (2000), 189 N.S.R. (2d) 287 (C.A.); *R. v. Leger*, *supra*; and *R. v. Wiswell* (1992), 110 N.S.R. (2d) 333; [1992] N.S.J. No. 135 (Quicklaw)(C.A.))

DISPOSITION:

55 I would grant leave to appeal, allow the appeal, set aside the conditional sentence and order that Mr. C.V.M. serve a sentence of imprisonment of twenty-two months followed by a three year probationary term with conditions. In addition to the statutory conditions Mr. C.V.M., while on probation shall: report to the Probation Services as directed by Probation Services; remain within the Province of Nova Scotia unless permission in writing is otherwise granted by Probation Services; attend for any mental health assessment as may be directed by Probation Services; and continue with or commence any substance abuse, anger management or other related program(s) or counselling as may be directed by Probation Services. Mr. C.V.M. has fully complied with the terms of his conditional sentence. I would, therefore, order that he be granted four months

credit for time already served. The weapons prohibition, which was not appealed, shall remain in effect.

BATEMAN J.A.

Concurred in:

GLUBE C.J.N.S.

ROSCOE J.A.

[166] It is difficult due to the variable circumstances in each of these cases to discern a precise range of sentence for the offences committed by LM.

[167] However, the Court of Appeal has consistently stated that sentences for violent offences committed against intimate partners, require primary emphasis on deterrence - specific and general.

[168] As the Court stated in *Coleman*, [1992] NSJ No. 84, adopting counsel's summation regarding such offences:

> "In summary, **the principal thrust of these cases is to indicate that general deterrence requires a significant period of incarceration in a provincial institution."**
>
> **[**My bolding added]

[169] Moreover, see also *R. v. Leger* [1997] NSJ No. 245 per Flinn JA:

> 11 Further, this Court has stated on numerous occasions that sentences for offences involving spousal violence must be based primarily on the principle of general deterrence. In *R. v. Desmond* (1992), 109 N.S.R. (2d) 174 (N.S.C.A.) Clarke C.J.N.S. stated:
>
> > **This Court has been saying in decision after decision that sentences for crimes of spousal assault must emphasize general deterrence** if we are going to try to reduce the increasing number coming before the courts. One example, of many, are the words of Mr. Justice Hallett in *R. v. Thompson* (1991), 99 N.S.R. (2d) 188, 270 A.P.R. 188 (C.A.), at p. 190:
> >
> > > '...The learned trial judge erred in that he put undue emphasis on the rehabilitation of the respondent and insufficient consideration of deterrence. The need to deter this offender and others of a like disposition must be given primary consideration when sentencing for an assault causing bodily harm in a domestic situation. A sentence as light as that imposed on the respondent sends out the wrong message to the respondent and others who may be inclined to similar conduct which is all to prevalent in our society.'
> >
> > [My bolding added]

9 – *R. v. Russell*, 2014 NSPC 8 (Del Atwood, PCJ)

[170] The headnote reads:

Sentencing of Russell for two assaults causing bodily harm and uttering a death threat. Russell assaulted his spouse on two occasions. The assaults caused numerous injuries, including black eyes, lacerations and a dislocated shoulder. Russell pled guilty, felt remorse and was intoxicated at the time of offences. The mitigating factors were Russell's lack of a prior criminal record and his steady employment history prior to being charged with the offences. The aggravating factors were the high level of violence involved in the assaults, the unprovoked nature of the assaults, the domestic violence context of the offences, Russell's abuse of a position of trust and the impact of the assaults on the victim.

HELD: Russell was sentenced to 12 months' imprisonment for each assault charge to be served consecutively, three months' imprisonment for uttering threats to be served concurrently, a non-contact order with the complainant, a DNA order, a 20-year weapons prohibition and a $500 victim surcharge.

The primary sentencing principle was proportionality. The severity of the assaults, as well of the other aggravating factors, warranted the imposition of a significant period of incarceration. Sentence: 12 months' imprisonment for each assault causing bodily harm charge to be served consecutively; three months' imprisonment concurrent for uttering death threats; non-contact order; DNA order; 20-year weapons prohibition; $500 victim surcharge -- *Criminal Code*, ss. 264.1(1) and 267(b).

10 – *R. v. MacLeod*, 2016 NSPC 84 (Del Atwood, PCJ)

1The court has for sentencing Stephen James MacLeod. Mr. **MacLeod entered guilty pleas at an early opportunity in relation to an array of summary counts:** possessing a machete for the purposes of committing an offence, uttering threats against police, resisting arrest, assaulting police with a weapon, and assaulting his wife.

2 The facts read into the record by the prosecution pursuant to ss. 723 and 724 of the Criminal Code and accepted as accurate by defence counsel are that police received word of a 911 domestic-violence report; the call had been placed 4:30
p.m. 19 March 2016. Police went right away to an address on Diamond Street in Westville. Officers met Victoria MacLeod, who was shaking and in tears; her clothing was blood-stained. Ms. MacLeod stated that she and Mr. MacLeod, who is her husband, had been arguing; he had thrown her around and then struck her in the face causing her to bleed. They had consumed alcohol, and Mr. MacLeod was reported by Ms. MacLeod as being highly intoxicated. More officers arrived. Ms. MacLeod informed police that Mr. MacLeod might have left for his mother's home. While police were speaking with Ms. MacLeod, a telephone call came in from Mr. MacLeod. One of the police officers took the call; it was Mr. MacLeod. The officer described Mr. MacLeod's speech as slurred very heavily. Police went directly to Mr. MacLeod's mother's home. They found Mr. MacLeod there, drunk and menacing. Mr. MacLeod threatened to shoot police. Police placed Mr. MacLeod under arrest. He pulled away, and brandished a machete which was ensheathed; Mr. MacLeod attempted unsuccessfully to remove the machete from its sheath. Police proceeded to take Mr. MacLeod to the ground; Mr. MacLeod struggled violently, and implored police to shoot him. Mr. MacLeod was subdued

effectively, and was taken away.

3 The para. 267(a) charge carries a maximum potential penalty of 18-months' imprisonment, as do the offences involving uttering threats against police; the remaining charges fall within the general penalty provisions of section 787 of the *Criminal Code*, and would attract maximum sentences of imprisonment of six months. There are no mandatory minimum sentences for any of the charges before the court.

4 **There is a joint recommendation here for a two-year bare federal term of incarceration; this would be the remainder—or go-forward sentence—after deducting credit for the period of time that Mr. MacLeod has been on remand,** reckoning one-and-a-half days' credit for each day of remand time in accordance with *R. v. Carvery* 2014 SCC 27, *aff'g*. 2012 NSCA 107. That would add up to a 141-day credit, which I will deal with in the court's *Truth in Sentencing Act* endorsement in relation to case number 2969521.

5 This is a common sentencing recommendation. As it was described to the court, **it is tantamount to a joint submission.** The Court of Appeal of this province, in *R. v. McIvor* 2003 NSCA 60, stated that a sentencing court may depart from a joint recommendation only if the court were to be satisfied that the joint recommendation would not be in the public interest or would bring the administration of justice into disrepute. In my view, the joint recommendation in this case is a reasonable one. It is a substantial sentence. It takes into account, first of all, Mr. MacLeod's record, which is substantial, and I would add that Mr. MacLeod was on conditional release at the time of these charges.

….

9 The recommendation takes into account the principle of sentencing parity, and is in line with similar sentences imposed in this court: *R. v. Cooper* 2015 NSPC 3; *R v. Russell* 2014 NSPC 8. It also reflects the statutorily aggravating characteristic of spousal-partner violence, in accordance with paras. 718.2(a)(ii) and (iii) of the *Code*.

10 The sentence of the court will be as follows: in relation to case number 2969518, the sub-s. 88(2) of the *Criminal* Code charge, that will be the starting-point sentence, three-months' imprisonment, $10.00 fine and $3.00 victim-surcharge amount.

11 In relation to case number 2969519, the first count of uttering threats, a sentence of three months to be served consecutively, plus a $10.00 fine and $3.00 victim-surcharge amount.

12 In relation to case number 2969520, the resist para. 129(a) charge, three months to be served consecutively, a $10.00 fine and $3.00 victim-surcharge amount.

13 In relation to case number 2969521, the para. 267(a) count, 12 months to be served consecutively, a $10.00 fine and $3.00 victim-surcharge amount. I will order and direct that the warrant of committal be endorsed to record, in accordance with the *Truth in Sentencing Act*, that, but for the remand time, the sentence of the court in relation to that count would have been 12 months, plus 141 days. That figure of 141 days is not part of the sentence, it is merely an endorsement, in accordance with the *Truth in Sentencing Act*, to reflect what the sentence would have been, but for the remand time. The warrant of committal will record the actual sentence for that count

> as being 12 months to be served consecutively, plus the $10.00 fine and $3.00 victim-surcharge amount.
>
> 14 In relation to case 2969523, the second charge of uttering threats, three months, but to be served concurrently, with a $10.00 fine and a $3.00 victim-surcharge amount.
>
> 15 And finally, in relation to case number 2969524, the assault charge, that will be a sentence of three months, to be served consecutively. A $10.00 fine and $3.00 victim-surcharge amount.
>
> 16 The sum is a total sentence of 24 months, to be served in a federal institution, or a bare two-year federal sentence.

[171] The circumstances of the offender and the offences can vary greatly, which makes it difficult to precisely articulate the range of sentence for similar offenders committing similar offences in similar circumstances as in the present case.

[172] From my many years of experience, and canvassing of the jurisprudence, I come to the following conclusions regarding the range of sentence for these offences.

1. s. 266(a) MW- January 2022: **9-12 months imprisonment** plus probation;

[173] "Bodily harm" is defined in section 2 of the *Criminal Code* as: "means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature".

[174] I am satisfied beyond a reasonable doubt that the January 2022 assault by LM of MW inflicted "bodily harm".

[175] This is significant in relation to it being an aggravating factor of the simple assault charged under s. 266(a) of the *Criminal Code* which carries a maximum sentence of imprisonment of 5 years. In contrast, section 267(1)(b), indictably elected, assault causing bodily harm, carries a maximum sentence of imprisonment of 10 years.[24]

2. s. 266(a) IM- Aug. 18, 2022: **4-6 months imprisonment** plus probation;[25]
3. s. 264.1 MW -Aug 18, 2022- **4-8 months imprisonment** plus probation;[26]
4. s. 335 MW's vehicle- Aug. 19,2022- **3-5 months imprisonment** plus probation;[27]
5. s.129(a) Cst. Sean Upshaw-Aug. 20, 2022-**2-4 months imprisonment** plus probation.

2 – What is the appropriate sentence for the offender in these circumstances?

[176] But for the resisting-arrest offence, all involve intimate partner

violence/coercive control related offences.

[177] I draw on in an analogous manner to the offences for sentencing before me, the following statement taken from *Friesen* at para. 50 in relation to child sexual offences:[28]

"Properly understanding the harmfulness will help bring sentencing law into line with society's contemporary understanding of the nature and gravity of sexual violence against children and will ensure that past biases and myths do not filter into the sentencing process."

[178] The headnote in *R v Friesen*, 2020 SCC 9, captures the crux of the Court's general reasons on sentencings. I reproduce it here:

> [30] All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing (see, e.g., *R. v. Wilmott*, 1966 CanLII 222 (ON CA), [1966] 2 O.R. 654 (C.A.)) and is now codified as the "fundamental principle" of sentencing in s. 718.1 of the *Criminal Code.*
>
> [31] Sentencing judges must also consider the principle of parity: similar offenders who commit similar offences in similar circumstances should receive similar sentences. This principle also has a long history in Canadian law (see, e.g., *Wilmott*) and is now codified in s. 718.2(b) of the *Criminal Code*.
>
> [32] Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality (*R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 36-37; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 78-79).
>
> [33] In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.

[179] Given LM's circumstances and the offences he has committed, collectively they should properly be seen as requiring sentences at the higher end of the range of sentence.

[180] I am concerned that LM will not receive significant, if any, rehabilitative programming if he is sentenced to a Provincial Correctional Facility.

[181] In those circumstances, the likelihood of him re-offending will tend towards being high, and there is a greater potential for serious injury, or even lethality.

[182] On the other hand, if LM is sentenced to a Federal Correctional Institution, he will be exposed to and have the opportunity to take advantage of significant rehabilitative programming, which I conclude would tend to decrease the risk of him re-offending.

[183] However, if he refuses to take part in or purposefully undermines the usefulness of such programming, doing so may well mean he will not be eligible for early release, such that he could remain in a Federal Correctional Institution longer than he might have with a nominally shorter sentence in a Provincial Correctional Facility.

[184] Whether LM's rehabilitation is best promoted by a sentence in a Federal or Provincial Institution, I will focus on what is a fit and proper sentence. I conclude a period of probation is required here to ensure attention is placed on LM's rehabilitation, and to provide MW and her family a basis to continue their lives without interference by LM. Section 731 CC permits probation in addition to a federal sentence only if the sentence is no more than two years imprisonment.

[185] Taking into account the many aggravating factors, and there being no significant mitigating factors here, applying the statutory Purpose and Principles of Sentencing and related provisions in the *Criminal Code*, including the relevant jurisprudence, to the specific circumstances of the offences and LM, and considering the "totality" principle, I conclude a fit and proper sentence for each offence is as follows (having factored in a "*Duncan*" credit as well as a "*Summers*" credit):[29]

a) **s. 266(a)** January 2022-MW- **10 months +2 years probation**

b) **s. 266(a)** Aug.18,2022- IM- **4 months consecutive +2 years probation**

c) **s. 264.1** Aug. 18,2022- MW-**5 months consecutive +2 years probation**

d) **s. 335(1)** Aug. 19, 2022- MW- **4 months consecutive +2 years probation**

e) **s. 129(a)** Aug. 20,2022-Cst. Upshaw- **1 month consecutive +2 years probation**.[30]

[186] My conclusions generate a total sentence of 2 years consecutive to any existing sentences of imprisonment,[31] and 2 years probation[32] (and ancillary Orders per ss.: 110(2.1) for life; 487.04 for secondary offences, s. 266 and 264.1; s. 743.21 Non-Communication Order regarding MW and her children during the custodial period of the sentence; no Victim Surcharge ordered).[33]

Conclusion

[187] LM is sentenced to 2 years in custody in a Federal Institution consecutive to any existing sentence, to be followed by 2 years probation, with ancillary Orders as listed above.[34]

Rosinski, J.

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[1] By his own choice, LM was not represented by counsel. At the December 1, 2022 and March 27, 2023 Pre-trial Conferences, LM confirmed he had a Certificate for counsel from Nova Scotia Legal Aid. The Court on manifold pre-trial occasions recommended / requested that LM make efforts to obtain counsel, including through Nova Scotia Legal Aid. He did not do so and hence remained self-represented during the jury trial. Notably, his criminal record history suggests he has previous personal experience in the criminal courts, and was familiar with accessing Nova Scotia Legal Aid, most recently evidenced on April 18, 2024, when he was to be represented by Nova Scotia Legal Aid counsel David Mahoney before the Nova Scotia Court of Appeal in CAC No. 524290. He took no meaningful steps to obtain counsel to represent him in this matter. He was advised by the Court, before the trial, to obtain subpoenas for any witnesses he wished to have attend at his trial on his behalf. He did not do so. This Court made repeated efforts to assist him as a self-represented person during the jury trial. At the end of the Crown's case, he made reference to requests for subpoenas for certain witnesses: Ann Longaphy and Diana Boutilier. The Crown's case did not materially change from what was clearly anticipated, and what LM would have expected after our repeated Pre-trial Conferences. At those Pre-trial Conferences LM was urged to consider obtaining subpoenas for any witnesses he sought to have present to testify before the trial started. The Court during the Pre-trial Conferences made it clear that LM was entitled to have subpoenas issued by the Court, and consequently I find he was well aware he had a right to have subpoenas issued for material witnesses of his choice, however given the lateness of the requests for the subpoenas, and serious questions whether one of the two named persons (Ms. Longaphy) was a material witness in relation to the precise allegations at issue, and whether there was any realistic possibility that Ms. Boutilier could be served at all, or in a sufficiently timely manner, the Court considered those requests and declined to issue subpoenas compelling their attendance. The Crown had advised the Court that, it had attempted to subpoena Ms. Boutilier without success. During the trial, LM himself suggested "she is on the run for the hit-and-run she is involved in". I note that I do not recall the mention of Ann Longaphy, at any prior Pre-trial Conference or otherwise, and I do not recall that her name arose during any of the Crown's trial evidence. At the end of the Crown's evidence, LM suggested she was the babysitter for MW's children and that "they were at her house after the incident… August 18, 2022 … no marks on [IM]".The evidence presented in relation to each of the alleged incidents specifically in issue did not suggest that Ms. Longaphy was personally present at the relevant times and/or had otherwise material evidence to present. Insofar as Ms. Boutilier was concerned, MW stated that she was present on August 18, 2022, in the house when LM struck IM, and when LM initially took her truck on August 19, 2022.

[2] See February 15, 2024, 2:05 PM transcription during MW's testimony / cross-examination. He made similar comments on at least one other occasion, which I believe was made during the pre-trial appearances.

[3] LM's position in argument was that MW "did not witness it (him hitting IM)". In his cross-examination of MW, he put his proposition to her, and although she responded that she had not seen what had happened, her proximity and observations by hearing left her with no doubt that he had struck her daughter, IM.

[4] This is consistent with his criminal record which indicates that on **May 4, 2022** he committed the following offences: operating a motor vehicle in an effort to evade police officers (s. 320.17 CC) and impaired driving (s. 320.14 CC) - both sentenced February 1, 2023; and on **June 10, 2022,** he was driving while impaired s. 320.14 CC - sentenced May 23, 2023. I infer that it was also a serious concern for her insofar as the validity of her insurance was concerned, should the vehicle, other property or persons be damaged by LM while driving her truck.

[5] LM was found "not guilty" of Count 6 (s. 145(5)(a) CC) as the Crown conceded it had not provided sufficient evidence to permit the jury to conclude beyond a reasonable doubt that LM had breached his Release Order by either possessing, using, or consuming alcoholic beverages or being under the influence thereof when outside his residence.

[6] A January 26, 2023, PSR was made Exhibit 3 at the sentencing. This was because LM had refused to cooperate in the preparation of a PSR in relation to these offences, and the Court was of the view that it was important to have general background information regarding him, in determining a fit sentence in the present circumstances.

[7] To be clear, *inter alia*, I will bear in mind that this PSR is intended to be of assistance only in relation to LM's rehabilitation for the offences before this Court, and is now over one year old, it concerns different offences, and a different victim, consequently the weight I can attach to it is to be appropriately affected thereby.

[8]I am not overlooking that LM pled guilty to the offences there in question and that having done so is a mitigating

factor, which could also be seen as a sign of possible rehabilitative potential.

[9] In *Diggs v. Nova Scotia (Attorney General)*, 2024 NSSC 11 at FN 10, I referenced some of the relevant jurisprudence. In that case, I also had affidavit evidence from NSHA affiants regarding the interrelated workings of their CNSCF staff and NSHA staff at CNSCF.

[10] These are drawn from Sentencing Exhibits 1 and 2, "CPIC" criminal record information, and the Nova Scotia Public Prosecution Service document provided to the Court: "Bail Report" JEIN Person ID 410743.

[11] The earliest release date for LM's sentences presently being served is August 5, 2024.

[12]The actual days of incarceration attributable to only these offences total 21 days – grossed up by 1.5 for *Summers* credit, they tally 32 days.

[13] See for example Justice Campbell's reasons in *Jennings v AGNS*, 2023 NSSC 148 and *Foeller v AGNS*, 2023 NSSC 149; and Justice Brothers's reasons in *R v Downey*, 2023 NSSC 204; and mine in *Diggs v AGNS* 2024 NSSC 11 and *Wilband v AGNS,* 2024 NSSC 12, and 2024 NSSC 128. (All under appeal at present).

[14] I have already made reference to the Exhibits provided by the Crown: the CPIC record and JEIN Bail Report which catalogue his past criminal convictions; and the January 26, 2023 PSR.

[15] There is no evidence that LM has had an existing prescription at the relevant times, and I am skeptical that he had such prescription but the Court was ultimately content, to not require evidence instead of these representations, on the basis that, for present purposes, these representations were true, in part because those factual issues are not central to the issue of a fit and proper sentence in LM's case.

[16] See *Diggs*, 2024 NSSC 11, FN 10.

[17] LM requested the Court's permission to mail a letter which he read into the record to MW and her children. In light of the Court's s. 743.21 CC Non Communication Order, no such mailing is permitted.

[18] I discussed with Crown Counsel and LM before the trial commenced, whether the vehicle had a value of greater than $5,000, because it was my opinion that if not so, this offence is not only a summary conviction offence, but procedurally subject to s. 553 CC, and therefore it is an absolute jurisdiction offence which can only be tried by the Provincial Court – unless an accused consents to join it with indictable offences pursuant to s. 574(2) CC. The Crown and LM agreed that the value was likely less than $5,000. LM consented to it being included on the Indictment.

[19] This would require a payment by LM of $200 per count in the Indictment, or $1,000. I bear in mind that LM has been in custody for an extended period of time and would continue to remain in custody for some time yet, such that he is unable to earn an income. I am satisfied that payment of the Victim Surcharge in his circumstances, would likely constitute "undue hardship", and I exempt him from paying any portion of it.

[20] On May 27, 2024, I wrote to LM and the Crown: "I wish to give each of you notice that I am considering a sentence that is greater than that recommended by the Crown, and which could include a short sentence in a federal penitentiary. I have not come to any conclusion about the appropriate sentence here, but I do consider the potential upper range of the appropriate total sentences in the circumstances may well include 2 years and more imprisonment in a federal penitentiary. As required by the Supreme Court of Canada reasons in *R. v. Nahanee*, 2022 SCC 37, I am required to give you notice of this, and an opportunity to respond… It will be most helpful to me to understand your arguments regarding my potential consideration of a short period of incarceration in a federal institution if I receive them in writing. Therefore, I direct that the Crown provide its response by **June 5, 2024**, and that [LM] provide his response in writing **by 4:00 p.m. on June 13, 2024.**" The Crown responded in part: "[LM] has continued to make profoundly concerning and disturbing comments on the Record… the prospects of rehabilitation as a cornerstone and the Crown's recommendation have been brought into question… As such, the Crown did also have cause to pause and reflect on the appropriateness of the recommended sentence.. Now paramount among the Crown's concerns…. are the safety/protection of the named victims as well as…society at large… the Crown submitting that a sentence of two years less a day followed by probation could still be appropriate." I infer that LM is opposed to a sentence in a federal institution as he did not expressly respond when given the opportunity to do so.

[21] The extent of revisions to the sentencing provisions of the *Criminal Code* is put in stark contrast when one considers that the *Criminal Code* in 1992 wherein Part 23 contained no expressed statements of: "Purpose and Principles of Sentencing" or "Objectives of Sentencing", or" Fundamental Principle" and "Other Sentencing Principles of Sentencing" such as contained in the present *Criminal Code,* Sections 718 – 718.201.

[22] The Crown has cited a number of cases from Newfoundland. It appears that there may be three categories of so-called physical child-abuse in their jurisprudence – see for example Judge Gorman's decision in *R. v. EH*, [2012] NJ No. 277 (Prov. Ct.). I find most of those cases distinguishable on their facts, although collectively they do reflect the seriousness with which the Newfoundland Courts treat them.

[23] The s. 245(b) summary conviction offence had a maximum sentence of up to a 2000$ fine or 6 months in jail, or both- s. 722.

[24] To be clear, I have not sentenced LM on the basis that the maximum sentence here is 10 years.

[25] Bearing in mind that LM lashed out and struck seven-year-old IM in the head.

[26] LM has several prior convictions for this offence and had also threatened JY- his immediately previous intimate partner- on April 21, 2021 – sentenced February 1, 2023.

[27] LM has a prior record for this summary conviction offence and numerous other forms of property related offences. This is also another example of coercive control of MW by LM

[28] I infer based on all the circumstances here that MW declined to provide a Victim Impact Statement in order to continue to disengage herself and children from LM, as a result of LM's past words and actions toward them.

[29] I recognize that I should make this sentence consecutive to his existing sentence (*R. v. Campbell*, 2022 NSCA 29) see also s. 718.2CC. I have considered not only "totality" regarding as between the 5 counts herein, but also the effect of making this sentence consecutive to his existing sentence, bearing in mind the reasons in *R. v. O'Brien*, 2011 NSCA 112 and *R. v. Knott*, [2012] 2 SCR 470.

[30] The acts of resisting arrest in the circumstances here involved a significant physical altercation between LM, who is physically formidable, and Constable Upshaw. While such encounters may be expected from time to time by police officers, in my opinion, Courts should not gloss over the inherent and unknown dangers thereof to the officers. Risks arose from the purposefully violent nature thereof in the present case as a result of the extent and duration of the resistance which could disable an officer and leave them especially vulnerable. Other risks of injury to similarly situated officers are created by circumstances unknown to the officers, such as, the potential for the presence of weapons, syringe needles, communicable diseases concerns, etc. Primary consideration on sentencing such offences should be to reinforce the importance of general and specific deterrence.

[31] Since this 2 years sentence of imprisonment will run consecutively to LM's most recent sentence being served (i.e. 661 days ordered on May 23, 2023/Earliest Release Date August 5, 2024) I have considered whether the totality of those sentences should cause a reduction in the sentence I am imposing, and have factored that into my consideration of what is a fit and proper sentence in the present circumstances. I have concluded that a reduction of the 2 years sentence is not required.

[32] Including all the statutory conditions, and: report to a Probation Officer at Halifax within three days from the date of expiration of his sentence of imprisonment, and when required as directed by your Probation Officer; remain within the Province of Nova Scotia unless you receive written permission from your Probation Officer; do not consume alcohol to the point of intoxication, or consume in any quantity drugs as defined in the *Controlled Drugs and Substances Act* and otherwise except as prescribed by a licensed Medical Doctor (for clarity, Cannabis is nevertheless permissible); have no indirect or direct contact or communication with MW or her children IM or EM – except through a lawyer; do not be on or within 500 m of the premises including those known as the residence, school or workplace of MW, IM, and EM; attend for mental health assessment and counselling as directed by a Probation Officer; attend for substance abuse assessment and counselling as directed by your Probation Officer; attend for assessment and counselling in a violence intervention program (spousal or partner related) as directed by your Probation Officer; attend for assessment counselling or program otherwise as directed by your Probation Officer; participate in and cooperate with any assessment, counselling or program directed by your Probation Officer.

[33] As LM is self-represented, I have notionally considered whether a Conditional Sentence Order is appropriate in the circumstances, and have concluded it is not because I am not satisfied that service in the community would not endanger the safety of the community, and that such sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*.

[34] I did not lightly come to the conclusion that a fit and proper sentence in the circumstances is one that exceeds the Crown's original and amended recommendation. My decision should not be considered a criticism of Crown counsel's exercise of its judgement and consequent sentence recommendation. The difference is only one of degree. I provided the parties an opportunity to comment on my consideration of exceeding Crown counsel's sentence recommendation, per *R. v. Nahanee*, 2022 SCC 37, and have considered their responses. I have had an especially advantaged view of the circumstances of this case and LM over a lengthy period of time, as well as the benefit of the Crown's sentencing recommendations, and LM's sentencing submissions. This case proceeded to trial. LM was found guilty by the Jury. I see no unwarranted material prejudice to LM arising from my having exceeded the Crown's sentencing recommendation, after having provided the parties with notice that I was considering same.