CR 02068

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JAMES MAGER

REASONS FOR JUDGMENT

1 On June 14th 1992 a serious disturbance of the public peace occurred in the vicinity of the main entrance to Giant Mine at Yellowknife.

2 James Mager, who is before the Court for sentencing today, took a prominently active part in that disturbance. As a result, he was then arrested by a member of the Royal Canadian Mounted Police, was charged with a number of serious offences, was placed under conditions restricting his liberty pending his trial on those charges, underwent a lengthy jury trial and was found guilty by the jury last month on three of the seven charges in the indictment.

3 Mr. Mager does not appear to have been an organizer or leader of the large number of striking miners who tore down the wire chain-link fence beside the main entrance to Giant Mine and stormed on to the minesite shortly after 7.00 p.m. on June 14th 1992. His evidence at trial was that he arrived after the fence had come down and the disturbance was already in progress. He decided to enter the mine property, he told the Court, to render

assistance to his fellow strikers.

4 According to Mr. Mager's testimony, he picked up a stick and took it with him. He also got a wool balaclava helmet out of the back of his vehicle and put it on. The helmet covered his face, leaving only two eyeholes and a hole at his mouth. It was coloured a very distinctive shade of lime green. No one else was seen wearing such a headcovering there that day.

5 By way of explanation, Mr. Mager told the Court that he had already seen himself on television during events in the course of the strike, as covered by national electronic media. Not wishing to be again displayed to the world in that way, he decided to wear the balaclava. It is plain that he knew he should not go on to the minesite. There was a court order in effect, of which he was aware, prohibiting any such action on his part. The fact that the police were not actively enforcing the order at the time did not excuse him in doing that. And the fact that he had received word from his fellow strikers that the Canadian Association of Smelter and Allied Workers, Local 4 (to which union he belonged) was holding a rally at the main gate to Giant Mine, at 7.00 p.m. that evening, did not excuse him either. Any such rally was clearly a flagrant breach of the court order. By putting on the mask of his balaclava, so as to completely cover his face, Mr. Mager acknowledged that he was quite deliberately breaking the law.

6 The jury evidently did not believe that this was all that was to it. In finding Mr. Mager guilty of having his face masked with intent to commit an indictable offence, the jury clearly came to the conclusion that Mr. Mager put on the balaclava with the intention of committing an indictable offence. It is an indictable offence under section 127 of the **Criminal Code** to disobey a lawful order made by a court of justice, without lawful excuse, where the order is one

other than for the payment of money, as was the case. That, in itself, was enough to justify the jury in rendering its verdict on that count in the indictment.

7 Having observed Mr. Mager as he gave his evidence during the trial and at the sentencing hearing earlier this week, I formed the impression that he believed, on June 14th 1992, that he was doing the right thing by joining the fray on the mine property, masked as he was nonetheless, and that he picked up the stick for that purpose. His version is that he had the stick to defend himself and his fellow strikers. He put forward a plea of self-defence on the sixth count in the indictment, charging him with an assault on Constable Maeda of the R.C.M.P. The jury rejected that plea in finding Mr. Mager guilty of that assault. I infer that Mr. Mager carried the stick for purposes going beyond self-defence. He used it to strike at a security guard whom he encountered after entering the property, in circumstances which could not be justified as self-defence. I rely on his own testimony in reaching that conclusion. And he used either that stick or another such implement, as a club, to strike another security guard as charged in count 4 of the indictment, of which the jury found him also guilty. The only reasonable conclusion to be drawn from the evidence of these two jury verdicts of assault, and the evidence as a whole in relation to the balaclava, is that Mr. Mager went on to the minesite masked with intent to commit those offences or offences like them, and not merely with the intent of breaching this Court's injunction orders.

8 It is apparent from the evidence before the jury at trial that Mr. Mager's balaclava was so unusual that, far from concealing his identity, it made his actions all the more clearly identifiable the minute he was unmasked, as occurred when he was finally arrested. Mr. Mager

seems to be of at least average intelligence. He must have been well aware of how distinctive his appearance was when wearing the balaclava. He was, he told the Court, a picket captain during the strike. And he described how strongly he felt about the actions of his employer in bringing replacement workers in during the strike. His evidence is that he and his fellow strikers resented the use of guard dogs to protect the mine property and the use of helicopters to cross the picket lines by means beyond their reach. I infer from this testimony, and the whole of the evidence, that he not only wanted to hide his identity from the television viewer and the police; but he also wanted to be noticeable as an active participant in the disturbance, as the striker in the green balaclava, so as to gain prestige amongst his fellow strikers and with the union in their continuing struggle against the employer during the strike.

9 The assault committed by Mr. Mager on the security guard, as charged in count 4 of the indictment, was one in which he approached the guard together with three other strikers. Mr. Mager swung his club and struck the guard behind his left knee, felling the guard to the ground, where the guard was subjected to additional blows and kicks as he lay helpless and in a fetal position in an effort to protect his head. Mr. Mager's only defence to this charge was that he took no part in the assault. The jury clearly rejected this. They evidently relied on the evidence of a half dozen witnesses, all of whom identified the man in the green balaclava as amongst the guard's attackers.

10 Mr. Mager is not charged with assault causing bodily harm contrary to paragraph 267(1)(b) of the **Criminal Code**. The two assault offences of which the jury found him guilty are assaults with a weapon, namely a club-like object, contrary to paragraph 267(1)(a) of the Code.

It is not a case where the Crown was obliged to prove that bodily harm was caused in order to sustain a guilty verdict. Nevertheless, there is some evidence as to the injuries suffered by the guard from the assault charged in count 4. Dr. Susan Perkins, a physician practising medicine at Yellowknife as a General Practitioner, examined the guard shortly afterwards, when he was taken to the Emergency Ward at Stanton Yellowknife Hospital. She ordered a chest X-ray, abdominal ultra-sound, and an X-ray of the guard's left knee. No broken bones were revealed. However, due to the pain complained of by the guard, she had the knee immobilised in ice overnight in the hospital and, following further examination, discharged the guard on crutches the next day. No internal bleeding was found. In her opinion, the knee appeared to have been struck by some firm object.

11 I conclude from the evidence that the guard suffered a beating but no permanent injuries. He appeared at trial to have fully recovered from his experience on June 14th 1992. Fortunately, both for him and for Mr. Mager, the circumstances of the case are not more greatly aggravated by the injuries inflicted in that beating.

12 It is enough, in any event, that the assaults of which Mr. Mager has been found guilty were assaults with a weapon. The degree of any resulting injury is only a secondary consideration.

13 Nor is Mr. Mager facing sentence for the offence of assault on a peace officer contrary to section 270 of the **Criminal Code**. The assault on Constable Maeda having been made with a weapon, as charged under paragraph 267(1)(a) of the Code, the maximum term of

imprisonment which is provided by law is twice that for an offence under section 270. It is therefore only an aggravating factor that this assault was on a peace officer.

14 The **Criminal Code** provides a range of sentencing options which are applicable in respect of all three offences of which the jury found Mr. Mager guilty. Those options include a discharge, with or without terms of probation, or a conviction followed by a suspension of sentence on terms of probation or a fine without limit as to amount, with or without probation, or a term of imprisonment not exceeding ten years, with or without a fine or probation. The Code today also provides for the imposition of a victims fine surcharge in addition to any other penalty and, in an appropriate case, for a weapons and explosives prohibition under section 100.

15 Neither Crown counsel nor counsel for Mr. Mager addressed the possibility of a discharge in this case, in my view rightly so. Counsel for Mr. Mager invited the Court to consider suspension of sentence. That option is opposed by the Crown, which seeks a term of imprisonment on each of the three counts on which Mr. Mager is now before the Court. Crown counsel has entered a stay of proceedings on a count of participating in a riot contrary to section 65 and has informed the Court that the Crown will not proceed further on that count. However, Crown counsel invites the Court to take into account the nature of the disturbance during which the actions of Mr. Mager took place as amounting to a riot, and, as I understand Crown counsel's submissions, that those actions amount to participation in the riot.

16 In view of the Crown's action in staying proceedings on the count under section 65 of the **Criminal Code**, so that no verdict is before me on that count, I do not consider that it is open to me to make a factual finding to the effect that the disturbance in question was a riot for purposes of the **Criminal Code**, or that Mr. Mager's actions amounted to participation in a riot. Mr. Mager is not to be sentenced for an offence of which he is presumed to be innocent, no verdict having been entered against him under section 65 of the Code.

17 Nevertheless, there is ample evidence before the Court to show that Mr. Mager took, as I have mentioned, a prominently active part in the disturbance at Giant Mine on June 14th 1992. The offences for which he is now before the Court are to be viewed in the context of that disturbance. It may be added that the maximum term of imprisonment which may be imposed for the offences now before the Court is several multiples of the maximum for an offence under section 65 of the **Criminal Code**. Once again, therefore, this aspect of the facts is to be treated as at most an aggravating feature of the offences before the Court.

18 Given the wide range of available sentencing options, it is necessary to consider not only the circumstances of the offences charged, as already outlined, but also the circumstances of the offender, in this case Mr. Mager. He is 39 years of age, married for almost 20 years and the father of two children aged respectively 18 and 12 years. Mr. Mager supported his family much more completely before the strike. Since then, while he has contributed as far as he is able, the main source of family support has been his wife, in a clerical occupation. The children are both still in school. Formerly engaged in private business as an autobody repairman, Mr. Mager came to Yellowknife about six years ago and was employed in various capacities at

Giant Mine before the strike. His employment at Giant was terminated by the Company shortly after his arrest on June 14th 1992. Since then he has taken odd jobs, including autobody work, but has found it difficult to tolerate the chemical fumes associated with that work. He believes that his health would be at risk if he were to return to that work.

19 Notwithstanding the reduced income of his family due to Mr. Mager's loss of wages during the strike, he informed the Court that he has a Registered Retirement Savings Plan account in an amount of $7,000.00. He also has certain monthly debts to pay, including rent and payments on a car loan.

20 Mr. Mager told the Court that he spends a good deal of time with his 12-year-old son, who is active in sports and enthusiastic about out-of-doors activities. Mr. Mager has himself been actively engaged in various sports and outdoor activities. Mrs. Mager described her husband as always having been a hard worker, putting in long hours at Giant Mine including overtime as required. According to Mr. Mager, he had no disciplinary record at Giant Mine and had not lost any significant work time due to sickness or for other reasons while employed there. He has managed to pay off business losses in his autobody enterprise incurred before coming to work at Giant, in an amount of about $40,000.00.

21 In the submission of counsel for Mr. Mager the offences for which he is now before the Court are "out of character". His previous criminal record is limited to a conviction for an assault arising in connection with the strike in May 1992 and a conviction for contempt of court arising from a breach of this Court's injunction orders in connection with the strike, other than the breach implicit in his actions on June 14th 1992.

22 While this record of other convictions is not a lengthy one, it does show that Mr. Mager had already found himself at odds with the law when the events of June 14th 1992 took place. As those events very clearly illustrate, it is only a short step, at times, from peacefully demonstrating to show solidarity in a legitimate cause, on one hand, to an unlawful defiance of lawful authority leading to violence and, in due course, to prosecution before the criminal courts on the other hand. Those who mistakenly take that short step must be prepared to accept the consequences. Where there is a record of a previous offence involving violence, the courts must become wary of exercising undue leniency in case it is misunderstood as being a lack of firm resolve to condemn violence.

23 The primary sentencing principle to be given effect in the present instance is, quite clearly, that of repudiation of the offences in question. By their verdicts in this case the jury have condemned the actions of Mr. Mager on June 14th 1992, as described in counts 4, 6 and 7 of the indictment. A disposition by the Court is now called for which recognizes that condemnation and repudiates those offences, thereby upholding the law and the rule of law on which our society depends for its security.

24 Linked to this primary sentencing principle there is, of course, the principle of deterrence, both in its specific aspect as it applies to Mr. Mager and in its general aspect as it applies to others who might be inclined to follow his example. The sentence of the Court must operate not only to deter or discourage Mr. Mager from any further crimes of violence; it must also operate, so far as that is at all possible, to deter and discourage others from committing similar crimes.

25 The Court must also consider the sentencing principle of rehabilitation and reform. Mr. Mager, as I have mentioned, appears to be sufficiently intelligent to know that he did wrong, that his actions amounted to crimes against Canada's **Criminal Code** for which he must suffer punishment. He has told the Court that he and his family have already suffered certain unpleasant consequences following his arrest and as a result of the court-ordered restrictions on his liberty which flowed from it. He has had to undergo days of court proceedings in both the Territorial Court and this Court. He has been obliged to hear testimony from the victims of his assaults as well as other witnesses. He has himself given evidence and been subjected to cross-examination. Had he foreseen all this on June 14th 1992, he might very well have decided to refrain from doing what he did then. He is better informed today than he was at that time. One may hope that he has learned a lesson.

26 Mr. Mager apologized to the Court earlier this week for having breached the Court's injunction orders. That is, in my view, a small but significant first step in his acknowledgement to the public of the wrong he has done. And while he still seeks to justify his actions then by blaming his employer for the situation in which he now finds himself, he is intelligent enough, as I see it, to realize that, in the end, he himself still has to accept personal responsibility, as an adult individual and citizen of this country, for his actions.

27 I do not anticipate that Mr. Mager is likely to reoffend in the manner of his actions on June 14th 1992. But it is evidently not easy for him to accept what the law now requires, since it must inevitably cause anguish not only to him but to his family, who are the indirect victims of his foolish enthusiasm for violent action on June 14th 1992.

28 Society's best protection, in the end, is the rehabilitation and reform of the offender, where the circumstances permit and the offender is minded to change his ways. The sentence of the Court is therefore intended to support and assist Mr. Mager in achieving, in due course, his eventual rehabilitation and re-entry into society.

29 In addition to the foregoing sentencing principles, which are primary in setting the sentence of the Court in this case, there is also a limiting principle based on the Court's estimate of the degree of the offender's fault, so as to demonstrate a due measure of proportionality in the sentence or sentences imposed.

30 It was argued that the employer's actions in employing replacement workers during the strike, the presence of guard dogs on the employer's property and the use of helicopters all served to provoke the events of June 14th 1992. Mr. Mager testified that these elements of the situation served to heighten the emotional tensions to which he and others then gave vent in the disturbance. I accept that this was so. But I do not accept that it can be used to mitigate the sentence of the Court in this case. Many private individuals keep dogs to guard their property. Helicopters, in a strike, may prevent injuries to company personnel from undisciplined strike supporters. And there is no law in the Northwest Territories which in any way restricts or prohibits the employment of replacement workers during a strike. None of these things entitled anyone to breach this Court's injunction orders by invading the minesite and there committing violence on persons and property.

31 I will add that there is a need now to enable people at Yellowknife to come to terms with what has happened during the strike, including the events of June 14th 1992. It is now

almost sixteen months since those events occurred. The sentence of the Court must therefore be to some extent tempered to avoid exacerbating the situation and, if possible, to discourage any resurgence of irrational emotionalism.

32 It must be understood that our criminal law has moved beyond the idea of revenge and is designed, quite deliberately, to discourage all notions of revenge. It has come to replace old customary methods of dispute resolution such as the blood feud, recognizing that there must be an end to conflict and that feuding only continues the conflict. Our criminal law has been said to have forgotten the victim of violent crime in the way the law operates. Yet Parliament has in recent days sought to give victims an opportunity to voice their pain by making a formal victim impact statement. No such statement has been placed before the Court in this case. I might say that this is rarely necessary because, as frequently occurs in this Court, the Court has already heard the victim orally testify and thus describe, in his or her own words, the impact of the offence on the victim. That assists the Court in crafting an appropriate sentence, more particularly in reference to the principle of repudiation or denunciation already mentioned.

33 It deserves to be said, furthermore, that the criminal law has evolved over time so as to remove from off the shoulders of the victim the burden of prosecuting an offender. While the victim may still be required as a witness, he or she can therefore leave it to others, officers of the Crown, to conduct the prosecution on behalf of the general public. Abuses which were once rife, where revenge or other personal motives led to a prosecution, have now been eliminated to a large degree by having public prosecutions conducted almost exclusively by

officers of the Crown acting in the name and on behalf of the Crown, instead of by private individuals claiming to be the victims of a crime.

34 Counsel have referred me to sentences imposed in other cases, some of which arose in connection with events during the current strike at Giant Mine and others of which arose in other situations both here in the Northwest Territories and elsewhere in Canada. One of the most recent of those sentences was in the case of James Fournier who was sentenced to serve a term of three months in gaol on being convicted of assault with a weapon, in a case where the victim of the assault suffered physical injury. It may be mentioned that the victim in that case was the same Eric Melanson as is named in count 4 of the indictment against James Mager.

35 The injuries suffered by Mr. Melanson were clearly not all inflicted during the assault committed by Mr. Mager, as charged in count 4 of the indictment before the Court. I refer, in particular, to the injuries to Mr. Melanson's chest, and the steps taken by Dr. Perkins to have his chest X-rayed and to check his interior for bleeding by use of ultra-sound. The injuries to Mr. Melanson's left leg and torso, inflicted during the beating by Mr. Mager and others, occurred prior to the injury inflicted by Mr. Fournier.

36 Mr. Mager and his companions were clearly out to inflict physical punishment on Mr. Melanson. The blows they struck were intended to inflict pain, if not injury. Mr. Fournier, on the other hand, merely wanted to splash Mr. Melanson and did not intend any physical harm to him. The injury which resulted from Mr. Fournier's foolish act was unintended. That is a very significant point of difference between this case of Mr. Mager and the case of Mr. Fournier.

37 Furthermore, Mr. Fournier entered a guilty plea, acknowledging his responsibility under the law for what he had done. Mr. Mager, on the contrary, exercised his right to a full trial, requiring the Crown to prove his identity as the man in the green balaclava right up to the point when Mr. Mager took the stand and admitted that he had been that man all along. This, and his testimony seeking to shift blame to others for what occurred on June 14th 1992, disentitles Mr. Mager to the same measure of leniency as the Court was able to extend to Mr. Fournier.

38 I refrain from discussing the other cases referred to by counsel, though I have considered them and thank counsel for bringing them to my attention.

39 Before pronouncing the sentence of the Court I should mention that I have of course given close attention to the submissions of counsel with reference to section 100 of the **Criminal Code**. It is common ground, I understand, between the Crown and the offender, that since these offences took place on June 14th 1992, before the recent amendments to section 100 of the **Criminal Code** came into force, the minimum period for which an order may be made under that section is, for present purposes, five years instead of ten as the amending provisions now require. That being so, I see no need to consider further the challenge made on behalf of the offender to the constitutional validity of the ten-year minimum in the present section, having regard to the decision of the Supreme Court of Canada in **R. v. Sawyer**, [1992] S.C.J. No. 105.

40 Counsel are agreed that the provisions of subsections 100 (1.1), (1.2) and (1.3) apply in this case, even though the substantive provisions of subsection 100(1) as of June 14th 1992 apply. On that basis, bearing in mind the evidence led at the sentencing hearing, I find that

it has not been established, on a balance of probabilities, that the conditions mentioned in subsection 100(1.1) have been met. In reaching that conclusion, I have of course considered the provisions of subsection 100(1.2). In particular, I am not satisfied that either of paragraphs (b) or (c) of the latter subsection is met. In all the circumstances I am unable to say that it would not be appropriate to make an order under subsection 100(1) as it stood on June 14th 1992.

41 The sentence of the Court therefore is that, first, an order is made for a period of five years under that subsection prohibiting you, James Mager, from having in your possession, during that period, any firearm, explosive or ammunition. You shall have 30 days from today within which to dispose of any such items now in your possession or, if not disposed of by then, to surrender them to the Royal Canadian Mounted Police.

42 In addition, Mr. Mager, you shall serve the following terms of imprisonment: on count 4, for the assault with a weapon on Eric Melanson, twelve months; on count 6 for the assault with a weapon on Paul Maeda, one month consecutive; and on count 7 for having your face masked with intent to commit an indictable offence, fifteen months to run concurrently with the other two sentences.

43 Furthermore, you shall be subject to a probation order for one year from the time of your release from imprisonment, on the conditions following during that year:

1. You shall of course keep the peace and be of good behaviour;
2. You shall report, forthwith on your release, to the senior probation officer in the place of your release and thereafter at

such times and places, and in such manner, as may be prescribed by a probation officer;

3. You shall perform a hundred and twenty hours of community service work during the first eight months of your probation, as directed by and to the satisfaction of your probation officers.

44 I direct the Clerk to prepare this probation order in the usual form and to read it over to you, providing you with a copy of it in the usual manner; and to read over to you the applicable provisions of the **Criminal Code**, which I expect your counsel, Mr. Austin Marshall, will explain to you if that should be necessary. From those provisions you will learn that you may be brought back before the Court if you are in breach of any of the conditions of your probation, or if your probation officer otherwise considers that to be necessary or desirable. You should know that the period of your probation can be altered by the Court, that the conditions of your probation can also be altered, and that you may be subject to proceedings under the **Criminal Code** with respect to any breach of those conditions.

45 Counsel did not address the Court with regard to a victims fine surcharge. Clearly, in the circumstances of count 4, there is a basis for considering such a surcharge as appropriate. Section 727.9 of the **Criminal Code** governs such matters. It requires the Court to impose such a surcharge unless the offender can establish to the satisfaction of the Court that undue hardship would result from doing so. I should therefore now hear from counsel in respect of that matter.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
October 7th 1993

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