Date: 2014 02 27
File: T1-CR-2013-001268
T1-CR-2013-001291

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

FOSTER ALLEN

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at:	Yellowknife, Northwest Territories
Date of Decision:	February 27, 2014
Counsel for the Crown:	Laura Wheeler
Counsel for the Accused:	Alanhea Vogt

[Sections 434, 430(4)x2, 145(3)x2 of the *Criminal Code*]
[Sentencing]

Date: 2014 02 27
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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

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- and -

FOSTER ALLEN

A. INTRODUCTION

A.1 Offences

[1] Foster ALLEN has entered guilty pleas to the following 5 charges:

(a) On or about the 24th day of July in the year 2013 at or near the City of Yellowknife in the Northwest Territories, he did intentionally or recklessly cause damage by fire to a 2003 Nissan Xterra vehicle, the property of DAVID RICHARD CASSON situated in the City of Yellowknife in the Northwest Territories contrary to Section 434 of the *Criminal Code*;

(b) On or about the 24th day of July in the year 2013 at or near the City of Yellowknife in the Northwest Territories, he did commit mischief by wilfully pulling wires out from under the dash without legal justification or excuse and without colour of right property to wit: a 2003 Buick Century car, the property of the Government of the Northwest Territories Department of Health and Social Services, the value of which did not exceed $5,000 contrary to Section 430(4) of the *Criminal Code*;

(c) On or about the 24th day of July in the year 2013 at or near the City of Yellowknife in the Northwest Territories, he did commit mischief by wilfully breaking a window, without legal justification or excuse and without colour of right property to wit: a 2002 Volkswagen Beetle car, the property of Top of the World (2000) Ltd., the value of which

did not exceed $5,000 contrary to Section 430(4) of the *Criminal Code*;

(d) On or about the 16th day of August in the year 2013 at the City of Yellowknife, Northwest Territories, he did being at large on his undertaking given to a justice and being bound to comply with a condition of that undertaking to wit: Shall abide by a curfew of 11 p.m. to 7 a.m. daily except in the event of a medical emergency without lawful excuse failed to comply with that condition by being in public between the specified hours of his curfew contrary to Section 145(3) of the *Criminal Code*; and

(e) On or about the 16th day of August in the year 2013 at the City of Yellowknife, Northwest Territories, he did being at large on his undertaking given to a justice and being bound to comply with a condition of that undertaking to wit: Shall not have in your possession any explosives or accelerants without lawful excuse failed to comply with that condition by having 3 lighters in his possession contrary to Section 145(3) of the *Criminal Code*.

[2] The Crown has read in the circumstances of these offences; Mr. Allen has admitted the truth of these circumstances and I have made findings of guilt with respect to each of the five counts. It is now my difficult task to impose a fit sentence. By way of background, the findings of guilt were made on November 20, 2013. In the course of the sentencing hearing, an issue arose as to whether or not Mr. Allen had been held in pre-sentence custody by consent or by operation of section 524(8) of the *Criminal Code*. This was resolved after counsel obtained transcripts of Mr. Allen's previous court appearances and determined that he had consented to his remand. Then counsel provided written submissions as to what credit Mr. Allen should receive for his pre-sentence custody.

[3] In the decision that follows, a reference to a section number without mention of a specific statute means a section of the *Criminal Code*.

B. POSITION OF CROWN AND DEFENCE

[4] The Crown submits that a global sentence of 2 to 3 years in custody is appropriate; comprised of a sentence of 1 ½ to 2 years for the arson, 8 to 10 months on each of the mischiefs, and 2 to 3 months for the breaches; with a discount to take into account the principle of totality.

[5] Counsel for Mr. Allen submits that a suitable global sentence would be 12 to 15 months in custody.

C. CIRCUMSTANCES SURROUNDING THE FINDINGS OF GUILT

[6] On July 24, 2013 at around 5:30 a.m., Mr. Allen was intoxicated and walking around in the downtown area of Yellowknife trying door handles on vehicles to see if the vehicles were locked. He was looking for spare change. In a parking lot behind Quality Furniture, he tried the handle on a Nissan Xterra. It was unlocked. Mr. Allen climbed inside and dug through the vehicle's contents. He found a bottle of motor oil and a bottle of gas line antifreeze. He poured the motor oil throughout the vehicle. Then he poured gas line antifreeze on the front seat and lit it using a lighter.

[7] Mr. Allen continued walking. He pulled the handle on an unlocked Ford Escape; then a Buick Century, which was also unlocked. In the Buick, he removed the moulding on the steering wheel column and pulled out numerous wires in an attempt to start it. This was unsuccessful.

[8] Mr. Allen walked around Franklin Avenue, pulling door handles and entering unlocked vehicles. From one vehicle, he removed a skull shaped figure. He came upon a Volkswagen Beetle and used this figure to break the window on the driver's side.

[9] At 6:00 a.m., the RCMP and firefighters responded to the fire in the Nissan Xterra and put it out. The vehicle had extensive smoke damage and the front passenger seat was destroyed.

[10] On August 11, 2013, Mr. Allen gave a statement to the RCMP admitting to the offences. He was released on a JP undertaking with conditions including a curfew between 11 p.m. and 7 a.m. and a condition to not have explosives or accelerants. On August 16, 2013, he was arrested by the RCMP at 1:40 a.m. He had three lighters in his possession.

[11] As a result of the damage to the Buick, the GNWT Department of Health had to pay $863 as the deductible. Top of the World paid a $613 deductible and a further $1,145 for replacing decals with respect to the Volkswagen. The loss with respect to the Nissan Xterra which had extensive smoke damage and the front seat destroyed, is not known.

D. THE OFFENDER'S CIRCUMSTANCES

[12] Foster Allen is 24 years old. The Court has had the benefit of a Pre-sentence Report which was prepared for this sentencing and which has, as an appendix, a PSR that was prepared for a sentencing in March of 2011.

[13] Mr. Allen has a criminal record which consists of 9 convictions including 7 property related offences and one offence for breaching a court order.

[14] Mr. Allen is an Inuit male who was raised primarily by his mother. Mr. Allen speaks Inuktitut and recalls traditional pastimes with his immediate and extended family members. He and his mother left his biological father when Mr. Allen was two. Mr. Allen's mother had a relationship with a male nurse for many years; moving from Iqaluit, to Broughten Island, to Fort McPherson, back to Iqaluit, to Pangnirtung, to Kimmirut, to Pond Inlet and then to Inuvik. This relationship ended in 2005 when Mr. Allen was 16. Currently, Mr. Allen's mother is in an abusive relationship with someone who has also assaulted Foster Allen.

[15] Mr. Allen has lived in Yellowknife since May 2011; first living with friends and then at the Salvation Army. Mr. Allen is a grade twelve graduate. He has had some employment in Inuvik working at the Eskimo Inn, the Mackenzie Hotel and Arctic Foods. Since being in Yellowknife he has had "day jobs" in construction. After he was arrested in August 2013, he started working in the kitchen at the North Slave Correctional Centre in September 2013; and works there 4 to 5 days a week. When he is released, he would like to return to Inuvik and seek employment with Horizon North Tug Boat Services.

[16] Mr. Allen admits to consuming alcohol every 2 to 3 days or whenever it is offered. He also admits to using marijuana every 2 to 3 days. Since he did not have a stable means of income prior to being incarcerated, he obtained money through day jobs and taking money from open vehicles.

E. THE PURPOSE, PRINCIPLES AND OBJECTIVES OF SENTENCING

[17] With respect to the arson and the two mischief offences on July 24, 2013, the arson charge is indictable by law and the Crown has proceeded by way of indictment on the mischief charges. The arson offence carries a maximum term of imprisonment of 14 years; the mischief offences each have a maximum term of imprisonment of 2 years. The two breach of undertaking offences proceeded by way of summary conviction procedure.

[18] In determining a fit sentence, I am guided by the purpose, principles and objectives set out in the *Criminal Code*, the circumstances of the offences and of Foster Allen, and the case law.

[19] The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

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

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

(d) to assist in rehabilitating offenders;

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

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

[20] I must start my analysis with the principle of proportionality which is considered to be the fundamental principle of sentencing. The principle of proportionality states that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[21] Then the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances.

[22] I must also be guided by the principle of totality which states that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; and the principle of parity which states that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[23] Finally, all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention paid to the circumstances of aboriginal offenders.

F. THE JURISPRUDENCE INVOLVING ARSON

[24] Of the five offences before the Court, the most serious is the arson offence. The Crown has provided me with three cases to assist in determining the

appropriate sentence. They are: *R. v. C.P.M.*, [2009] A.J. No. 247, *R. v. Fewer*, [2004] N.J. No. 433 (Nfld & Lab. P.C.) and *R. v. Bernhardt*, 2013 NWTSC 54.

[25] The reason that arson is treated so seriously was explained in *R. v. H.(K.)* (1994), 146 N.B.R. (2d) 372, 374 A.P.R. 372 (N.B.C.A.) by Chief Justice Hoyt:

> By any yardstick, **arson** is a serious offence. An adult is liable to imprisonment for fourteen years. Fire, no matter how well planned, is often erratic and unpredictable and gives rise to unforeseen consequences. For sentencing purposes, arsonists are sometimes divided into four types: pyromaniacs or persons who are mentally disturbed, those who burn for no special reason or a grudge, vandals and those who burn for financial gain. K.H. and his two companions fall into the latter category, which is generally considered to be the most blameworthy type of arson, thus attracting the most severe punishment, although there are ranges within each category [*sic*].

[26] As Justice Schuler stated in *R. v. Bernhardt*, 2013 NWTSC 54,

> 15. As is noted in some of the cases filed by counsel for the Crown, arson is viewed as a very serious offence because of the terrible consequences that can result from it. Fire is unpredictable and no matter what the person setting the fire may actually intend, fire can easily get out of control and lead to terrible consequences that were not foreseen or intended. Setting a fire, especially in an area where people live close by, or to a piece of property that could explode, puts the lives of people at risk. It puts the lives of firefighters and others who attempt to extinguish the fire at risk, and obviously, in this case, Frank and Tommy Edwards fall into that category. So that is why the offence is treated so seriously.

[27] In *Bernhardt*, the accused had set fire to a vehicle as a result of being angry at the woman who he thought owned the car. The fire was set at 11:30 a.m.; it was near residences and Mr. Bernhardt left the scene. He had a limited criminal record; was a hardworking individual who was helpful to his family and responsible to his son. He received 9 months in custody; with a year of probation, a restitution order and a DNA order.

[28] In *R. v. C.P.M.*, [2000] A.J. No. 247, Judge Allen stated, after reviewing a number of cases from Alberta and other jurisdictions:

> **49** The jurisprudence demonstrates that the sentencing length varied with the circumstances. My review of the jurisprudence causes me to conclude that generally an offender who commits a s. 434 offence would receive a sentence of less than two years duration.

[29] To justify this assessment, Judge Allen reviewed a number of arson cases in Alberta between 1985 and 2007. He also identified arson cases which resulted in penitentiary terms of imprisonment. These latter cases often involved charges under section 433, which carries a maximum penalty of life imprisonment. The facts also involved considerable property damage or situations where residences were set on fire or where individuals were hired to set fires or who did so for

revenge purposes. The facts of Foster Allen's case differ from these latter cases where penitentiary time was imposed.

G. AGGRAVATING AND MITIGATING CIRCUMSTANCES

[30] Mr. Allen has entered guilty pleas to all of the matters which are before the court for sentencing. The effect of these guilty pleas will be to reduce the sentence which I would otherwise give him. The guilty pleas indicate that he has accepted responsibility for the offences and that he is remorseful. It also means that he has given up his constitutional right to a trial thereby sparing the witnesses and the state the time and money of proving the offences against him.

[31] With respect to Mr. Allen's moral blameworthiness, I note that there did not appear to be any planning with respect to the arson. Mr. Allen took advantage of the oil and the gas line antifreeze that were in the vehicle that he came upon. His motive for breaking into the vehicles was to find spare change. His motive for the arson and the mischief appears to have been to vandalize. This was affected, no doubt, by his level of intoxication. He stated to the author of the PSR that he committed the offences "out of frustration because I was broke and homeless." That his situation in life has not changed since the time of the offences and the time of sentencing is an indication that he is at a high risk to re-offend.

[32] Had the burning vehicle been located near to a residence, the offence would have been much more serious. Still, as was stated earlier, a burning vehicle, even if isolated from other property, has the potential to explode and poses a danger to passersby and to the firefighters who put out the fire.

[33] Mr. Allen's criminal record is aggravating. He has seven property offences on his record; a failure to comply with a probation order and an assault. In the past he has received six months of custody for a break and enter and one month of custody for the failure to comply with an undertaking.

[34] The nature of the breaches of undertaking is serious. Mr. Allen was released on the mischief and arson charges yet was caught with three lighters in his possession.

[35] I have considered Mr. Allen's aboriginal background. The *Gladue* and *Ipeelee* factors have some significance. He has been exposed to domestic violence and many of the systemic factors to which those two cases direct the Court to be aware of are present. There is a relationship between his upbringing and where he finds himself now - on the streets in Yellowknife with a dependence on alcohol and drugs.

[36] The cases are clear that the primary principles of sentencing that must be applied in all cases of arson are those of general deterrence and denunciation. The reasons for this emphasis were stated in *R. v. Fewer* [2004] N.J. No. 433 by Judge Gorman:

> 36. The primary principles of sentencing that must be applied in all cases of arson are those of general deterrence and denunciation. Arson obviously causes property damage; however, the seriousness of this offence extends well beyond any property damage that might occur. Fire is inherently dangerous and difficult to control. Setting fire to a building can have unintended and fatal consequences. There are various individuals in our society that have the unenviable task of being required to respond to fires. They risk their lives every time they do so. Arsonists recklessly place the lives and safety of such individuals at risk. Therefore, the sentences imposed for this offence must reflect this factor.

[37] Given Mr. Allen's young age, I must also keep in mind his potential for rehabilitation. There is no other disposition that will achieve these objectives other than a period in custody. Given Mr. Allen's comments in his PSR about being unable to comply with conditions, a sentence served in the community is not an option.

[38] The effects of Mr. Allen's offences of arson and mischief are fortunately, confined to property damage. I have considered a restitution or compensation order, but given Mr. Allen's current position in life, there is little chance that he would be able to make the necessary payments.

H. SENTENCE

[39] For the reasons stated above, Foster Allen is sentenced to imprisonment for 2 years less 1 day. This sentence is broken down as follows:

Date	**Section of *Criminal Code***	**Sentence**
2013-Jul-24	434	12 months
2013-Jul-24	430(4)	5 months consecutive
2013-Jul-24	430(4)	5 months consecutive
2013-Aug-16	145(3)	2 months less 1 day consecutive
2013-Aug-16	145(3)	2 months less 1 day concurrent

[40] In addition, Mr. Allen will be on probation for one year after he is released from imprisonment. The terms of this probation will be as follows:

(a) keep the peace and be of good behaviour;

(b) appear before the court when required to do so by the court;

(c) notify the court or the probation officer in advance of any change of name or address;

(d) promptly notify the court or the probation officer of any change of employment or occupation;

(e) report to a probation officer within two (2) working days of your release from imprisonment and thereafter as directed by the probation officer; and

(f) actively participate in counselling as directed by the probation officer and to the satisfaction of the probation officer, including but not limited to counselling for substance abuse and anger management.

[41] Section 434 is a secondary designated offence with respect to an order for the collection of DNA samples. Given Mr. Allen's criminal record and the nature of the offences before the Court, I am satisfied that the interests of society in crime detection and investigation outweigh the minimal incursion into Mr. Allen's privacy and security of the person caused by a DNA test and I make an order for the taking of DNA under section 487.051 of the *Criminal Code*.

[42] There were will be a firearms prohibition order pursuant to section 110 of the *Criminal Code*. Mr. Allen will not possess firearms or any of the other items enumerated in section 110 for three years from the date of his release from imprisonment.

[43] The victim of crime surcharge is waived due to hardship.

I. CREDIT FOR PRE-TRIAL CUSTODY

I.1 Factual Situation

[44] Mr. Allen has been in custody since August 16, 2013 a total of 196 days. He consented to his remand after being arrested for three breaches of his conditions of release. He entered his guilty pleas on September 24, 2013. The sentencing submissions were made on November 20, 2013. Submissions on the issue of whether or not Mr. Allen's process had been cancelled pursuant to section 524(8) were adjourned until December 17, 2013.

[45] Counsel for Mr. Allen and the Crown agree that Mr. Allen was not detained in custody under subsection 524(8) and that therefore the Court is not restricted to giving credit for pre-sentence custody on a 1 for 1 basis by operation of section 719(3.1) of the *Criminal Code*.

[46] Counsel for Mr. Allen made representations to the Court that Mr. Allen's case worker had stated the Mr. Allen "had done really well in the North Slave Correctional Centre and that he would have earned remission if he had been a serving prisoner."

I.2 Do the "Circumstances justify it"?

[47] Over at least the past two years, Judges of the Territorial Court have consistently used loss of the ability to earn remission as a reason for granting credit at a rate of 1.5 to 1 for the time spent by accused persons in pre-sentence custody. In order to establish eligibility for this credit, the accused is required to provide evidence that his behaviour during pre-sentence custody was such that, had he been a sentenced inmate, he would have received earned remission. In treating credit for pre-sentence custody in this manner, the Territorial Court has been consistently following *R. v. Desjarlais*, 2012 NWTTC 02, a case decided by the Chief Judge of the Territorial Court and various cases from across Canada including*: R. v. Vittrekwa*, 2011 YKTC 64; *R. v. Johnson*, 2013 ABCA 190; *R. v. Stonefish*, 2012 MBCA 116; *R. v. Summers*, 2013 ONCA 147; and *R. v. Carvery*, 2012 NSCA 107.

[48] The issue of the appropriate credit for pre-sentence custody involves the interpretation of the phrase "if the circumstances justify it" in section 719(3.1) of the *Criminal Code*. It is an issue that is currently before the Supreme Court of Canada by way of the appeals of *R. v. Carvery* and *R. v. Summers.* The appeals were heard on January 23, 2014 and the decision has been reserved.

[49] The Crown submits that this Court should consider its treatment of the pre-sentence custody for Foster Allen in light of certain cases which have been decided in the Supreme Court of the Northwest Territories. More specifically, in *R. v. Nitsiza*, 2013 NWTSC 73, the NWT Supreme Court stated:

> 4 Section 719(3.1) of the *Criminal Code* allows the court to grant credit at the rate of up to one and one-half days for each day spent in presentence custody if the circumstances justify it. In using the word "justify" it is clear that Parliament did not intend that the circumstance have to be exceptional; however, it is also clear that the circumstances have to justify it and they have to be individual to the accused. This was the conclusion reached by the Manitoba Court of Appeal in *R. v. Stonefish*, which is cited at 2012 MBCA 116 and which has been applied and used by this court in the past.
>
> 5 To show that the circumstances that justify enhanced credit are individual to the accused, there has to be evidence of those circumstances, whether that is through affidavit, live testimony, or, as here, counsel's sentencing submissions. In my view, however, **it is not enough to simply submit that a prisoner on remand would have earned remission had he or she been a serving prisoner**, and I agree with the Crown that to adopt that argument would defeat entirely the amendments to the *Criminal Code* which created the general rule that credit should be granted on a one-to-one basis unless justified in the circumstances. Remission is something that is open to all serving

> prisoners so it is difficult to see how it could be seen as a circumstance that is individual to Mr. Nitsiza. That said, in some circumstances the decision to seek a presentence report and the delay that is necessarily entailed with that is a circumstance that is considered individual to the accused and one which justifies enhanced credit. [emphasis added]

[50] In *Nitsiza*, the Court had information from correction officials that, but for a brief period of time, Mr. Nitsiza would have earned full remission had he been a sentenced prisoner. I accept the Crown's submission that if I were to apply *Nitsiza* to Foster Allen's situation, despite the Court's apparent acceptance of the *Stonefish* case in *Nitsiza*, I would have to deny his request for enhanced credit based on loss of earned remission.

[51] In *Nitsiza*, the NWT Supreme Court treats credit for pre-sentence custody differently than it did in the other cases cited by the Crown, including *R. v. Mannilaq*, 2012 NWTSC 48; *R. v. Lepine*, 2013 NWTSC 19; and *R. v. Green*, 2013 NWTSC 20. In these latter cases, the Court's awarding of enhanced credit for pre-sentence custody was consistent with the approach in *Desjarlais*.

[52] The Crown requests that I reconsider the Territorial Court's treatment of pre-sentence custody as illustrated by the cases cited in paragraph 47 above. The Crown's position is that this Court should adopt the approach of the NWT Supreme Court in *Nitsiza* and the BC Court of Appeal in *R. v. Bradbury*, 2013 BCCA 280 and not award enhanced credit to Mr. Allen simply because he would have received earned remission if he were a serving prisoner.

[53] There is a certain attraction to adding another decision to the long list of decisions that have already been written with respect to the proper interpretation of the phrase in s. 719(3.1), "if the circumstances justify it". The fact is, however, that the Supreme Court of Canada will decide the matter in the near future with or without me weighing in and regardless of what I can add to the debate. More importantly, in my view, the approach in *Desjarlais* is correct and the principles of *stare decisis* and judicial comity allow me to stay the course and to decide Foster Allen's case in the way that has been previously utilized by me and the other Judges of the Territorial Court.

[54] In coming to this decision, I have considered and adopted the reasoning of Provincial Court Judge Allen in *R. v. Letourneau*, [2008] A.J. No. 752. In *Letourneau*, the Court examines both *stare decisis* and judicial comity. His examination includes references to case law throughout Canada. I will not repeat his reasoning but having read the decision carefully, I am in agreement with and will adopt his reasoning. The result, as it applies to the situation involving the decisions in the Northwest Territories regarding the interpretation of "if the circumstances justify it" can be summarized as follows:

(a) Trial judges are bound to accept as binding the law as pronounced by appellate courts above them in the judicial hierarchy;

(b) In *Nitsiza*, the NWT Supreme Court Justice was acting as a trial judge, not as an appellate court;

(c) The NWT Supreme Court has not made a decision with respect to the interpretation of "if the circumstances justify it" in the context of s. 719(3.1) while acting as an appellate court;

(d) In the cases cited before this Court, the NWT Supreme Court was a court of coordinate jurisdiction to the Territorial Court acting in the Foster Allen case. The Foster Allen case involves indictable offences, which if appealed, will be appealed to the NWT Court of Appeal; not to the NWT Supreme Court;

(e) Judicial comity provides that judges of coordinate jurisdiction should follow each other. A NWT Supreme Court Justice acting as a trial judge is a judge of coordinate jurisdiction to a trial judge in Territorial Court;

(f) The general rule of judicial comity requires a trial judge to follow trial judges from courts of coordinate jurisdiction except in 3 situations:

    (1) subsequent decisions have affected the validity of the impugned judgment;

    (2) it is demonstrated that some binding authority in case law, or some relevant statute was not considered; and

    (3) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

(g) A fourth situation arises in criminal cases. A judge should not follow another judge's decision in a court of coordinate jurisdiction if he or she believes, upon full consideration, that the other judge is wrong.

[55] For the reasons stated, I am not bound by the decision in *Nitsiza*. In my view, the reasoning of the Territorial Court in *Desjarlais* and the other cases cited in paragraph 47 continue to be valid and the treatment of Mr. Allen's pre-sentence custody will be on that basis.

I.3 Credit for Mr. Allen's Pre-sentence Custody

[56] In determining what credit Mr. Allen should receive for his time in remand, I have considered his behaviour after his arrest on August 12, 2013. He was arrested on that date for the arson and mischief charges and released on an Undertaking given to a Justice. He breached that Undertaking on August 16, 2013 by disobeying his curfew and possessing lighters. He was arrested. He has entered guilty pleas to two of the section 145(3) breach charges.

[57] The Court has the discretion to award enhanced credit to a limit of 1.5 to 1 "if the circumstances justify it." There are a number of reasons why a court would not grant enhanced credit or would even deny credit in addition to the statute-imposed restrictions in s. 719(3.1). Some of these are summarized in the following quote from the Nova Scotia Court of Appeal in *R. v. LeBlanc*, 2011 NSCA 60:

> 22 Various factors may justify the principled exercise of the sentencing judge's discretion to abridge or even deny credit for remand time, including evidence that earlier release would not promote rehabilitation, failure to seek bail, remand because the accused failed to appear as required, the offender's conduct while on bail such as breach of conditions of release, a significant or violence based criminal record, or that the offender would pose a danger to society. *R. v. A.N.*, 2011 NSCA 21, para. 40; *R. v. Ali*, 2009 ABCA 120, paras 4 and 19; *R. v. Tschritter*, 2006 BCCA 202, paras 3-5, 15; *R. v. Gallant*, 2004 NSCA 7, paras 20-22; *R. v. Vermette*, 2001 MBCA 64, para. 66; *R. v. Gillis*, 2009 ONCA 312, para. 11; *R. v. Coxworthy*, 2007 ABCA 323, at paras 9, 16.

[58] In *R. v. Coxworthy*, 2007 ABCA 323, the Alberta Court of Appeal endorsed the trial judge's decision to restrict the credit for pre-sentence custody based on the judge's assessment that the accused, by his own actions, had brought on the revocation of bail and consequent pre-trial custody.

[59] On the other hand, in *R. v. Sabourin*, [2009] N.W.T.J. No. 49 at para. 19, the Northwest Territories Court of Appeal stated that "the existence of such post-offence conduct should also not negatively influence the pre-sentence custody credit as it would either be a factor on the index sentence or subject to separate prosecution." In Mr. Allen's case, although he was arrested as a result of the breaches on August 16, 2013, he is being sentenced for two of those breaches and will receive a separate punishment. He should not also be punished by losing enhanced credit that he would otherwise be eligible to receive by way of his good behaviour while on remand.

[60] He will receive credit for his pre-sentence custody at a rate of 1.5 to 1. In total, he shall receive 294 days credit for the 196 days he has been in pre-sentence custody.

J. SUMMARY

[61] In the absence of credit for pre-sentence custody, Mr. Allen would be sentenced to 2 years less a day or 729 days. After receiving 294 days credit for pre-sentence custody, Mr. Allen is sentenced to a further 435 days imprisonment in addition to the other sanctions stated earlier in this decision.

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest Territories, this 27th day of February, 2014.

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