Citation: *R.* v. *Malcolm,* 2011 YKTC 25

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Docket: 07-00701A
07-00701B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

TROY ALCOMA ANDRE MALCOLM

Appearances:
Kevin Komosky — Appearing for the Crown
Jennie Cunningham — Appearing for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Troy Alcoma Andre Malcolm has entered a plea of guilty to having committed the offence of assault with a weapon, contrary to s. 267(a) of the *Criminal Code*. The Crown originally proceeded by indictment on a two-count Information sworn February 7, 2008. This Information was replaced by a three-count Information sworn February 11, 2008, that included a charge of aggravated assault. A third single-count Information was sworn April 15, 2008, and the Crown proceeded by summary conviction on this Information.

[2] The circumstances of the offence are that on December 23, 2007, Mr. Malcolm

was at a local tavern celebrating his birthday. He invited some individuals from the tavern to return to his residence. When he arrived at his residence, a larger number of people than he had anticipated were already there, many of whom were uninvited and belligerent. Someone had entered into a shed on his property and obtained several swords from his collection, bringing these back into the residence.

[3] The victim of the assault, Jim Parsons, had one of these swords. Mr. Malcolm, who was upset that his swords had been retrieved, took the sword out of Mr. Parsons' hands and poked him in the chest with it, making reference to it being his house. There was no immediate indication that Mr. Parsons had been injured, although, within five minutes, he collapsed. He was taken to the hospital and released. He returned to the hospital, however, due to not feeling well, and it was discovered that the sword had pierced the heart lining. He also suffered collapsed lungs. He was medevaced to Edmonton for further treatment.

[4] A victim impact statement was filed. Mr. Parsons suffered not only a serious personal injury but was also quite impacted emotionally. An excerpt from the victim impact statement is as follows:

> To get medivaced because I might have to have surgery, and was told I might not make it made me scared, I accually thought I was going to die. I didn't think I would ever see any of my family again. It was mentally draining to be in Edmonton over Christmas with no family or friends there. All my family in NFLD was worried sick, because at first nobody could talk to me due to me not being able to move out of the hospital bed for a few days. Plus being hooked up to all the monitors. I was alone, my blood pressure was high because of not being able to rest in the hospital. Worried and stressed over wondering why this happened to me. I could not sleep a full night for over a month. I would have night mare of dieing and wake up soaked with swet.

[5] He also suffered financial losses from employment and disbursements, for which he seeks compensation in the amount of $12,086.

[6] When the RCMP attended at his residence, Mr. Malcolm was cooperative and forthcoming with respect to what had happened and his involvement. It was agreed that, although Mr. Malcolm committed the act of assault with a weapon which caused the injury suffered by Mr. Parsons, he had no intention of causing any injury at all. This could be characterized more as an act of recklessness. While alcohol was involved in the incident, it was not considered to be a significant factor.

[7] The circumstances of Mr. Malcolm: A pre-sentence report has been filed. Mr. Malcolm turned 25 on December 22, 2007. He has no criminal record. His father committed suicide when he was six years old. He is the oldest of three brothers and five sisters. He has a close relationship with his mother, and continues to be supportive of her in providing assistance with his younger siblings. He is attempting to acquire his GED by challenging the math examination, which he has previously failed. He is also working on an electronic technician's course through correspondence and maintaining an 80 percent average.

[8] Since the age of 17, he has maintained more or less continuous employment at several jobs. His most recent job at Total North Communications lasted from March 2007 to February 2008. He indicates that he was laid off because they needed a fully qualified technician. This is what prompted him to take the current course. He is currently on a term contract with the Government of Yukon until September 2008, and earns $22 an hour. He was married on September 1, 2007, and together, he and his

wife have purchased a home. They have assets in the amount of approximately $280,000, and debts of approximately $240,000, which debt requires payments of approximately $1,137 per month. They hope to have a family within the next year when they are more financially stable. His wife is employed and earning approximately $1,200 bi-weekly.

[9] Mr. Malcolm is remorseful for the incident and the injuries he caused Mr. Parsons. He does not blame Mr. Parsons for the incident and states that he has no justification for what he did. He has written an apology letter for Mr. Parsons and another apology letter to his wife, family, and friends. He states that this was an out-of-character incident for him, that he had too much to drink that night, and while accepting responsibility for the incident, stated that the injuries he caused were an accident.

[10] He has been a volunteer boxing coach in the community for several years and states that he tries to show the kids he works with that hard work, discipline, and self-sacrifice pay off. He is currently the president of Boxing Yukon. He has provided a strong letter in support of his boxing-related activities from a community member also involved with him in volunteering at Boxing Yukon. This letter indicates that Mr. Malcolm has successfully completed levels 1 and 2 of the National Coaching Certification Program, and he is now the sport's head coach. The writer of this letter also considers this to be an out-of-character incident for Mr. Malcolm.

[11] Mr. Malcolm was assessed with a level of service inventory that surveys static and dynamic risk attributes of offenders. His assessment places him in the very low-risk category to reoffend.

[12] Crown counsel's position is that a conditional sentence in the eight to 12 month range should be imposed. He is not seeking a period of probation to follow other than, perhaps, to facilitate compensation to Mr. Parsons. This was a deliberate act with foreseeable, although, unlikely consequences, that had a severe impact on Mr. Parsons. With respect to the principles set out in s. 718 of the *Code*, Crown acknowledges that specific deterrence, the separation of Mr. Malcolm from society, and rehabilitation, are not prime concerns. More applicable are the principles of denunciation, providing reparation to Mr. Parsons, and promoting a sense of responsibility in Mr. Malcolm, as well as acknowledgement of the harm done to Mr. Parsons and to the community. The Crown also relies upon s. 718.1, and emphasizes the gravity of the offence.

[13] The aggravated assault case of *R.* v. *Taylor*, [2008] M.J. No. 211, was provided in support of Crown's position. The facts of this case are that Mr. Taylor, a 46-year-old First Nations individual with no criminal record and a very positive personal history, was involved in a consensual fight which was initiated by the aggression of the victim, who struck Mr. Taylor in the face. Mr. Taylor took the victim to the ground and struck his head once or twice in an altercation that lasted less than 30 seconds. The victim left the scene but, ultimately, he was discovered to have suffered a traumatic head injury. The results were catastrophic, with the victim required to be confined for life to a chronic care institution, breathing and being fed through tubes. Mr. Taylor did not intend to cause the victim to suffer the injuries that he did, stating to the police, "I never meant to hurt the guy that bad." This was agreed to be an out-of-character offence for Mr. Taylor, and Crown took no position on defence counsel's submission that a two year less one

day conditional sentence be imposed. The sentence suggested by defence counsel was, in fact, imposed by the sentencing judge.

[14] In this case, Crown counsel is also seeking compensation for Mr. Parsons. He has filed a letter from the owner of Matheson Oil Burner Service, indicating that Mr. Parsons had been scheduled to commence employment on December 27, 2007, as an oil burner service apprentice. He would have been earning $22 per hour, and been employed for 40 hours per week, until April 2008. Mr. Parsons provided information that he was only cleared for return to light duty employment on March 1, 2008, but was not able to work for Matheson Oil Burner Services; that job was no longer available for this season. The letter indicates that he will be offered employment again in the fall of 2008.

[15] Mr. Parsons was able to find employment, commencing April 1, 2008, as a roofer. He is seeking compensation for the loss of employment in the amount of $11,968, although, by my calculation, he lost 46 days employment until March 1, 2008, and an additional 21 days until April 1, 2008. At $22 per hour for an eight hour day, this calculates at a total of $11,792.00, being $8,096 and $3,696, respectively. He also seeks compensation for the $118.92 for airplane fare from Edmonton back to Whitehorse, and incidentals.

[16] The position of defence: Defence counsel submits that Mr. Malcolm is a good candidate for a conditional discharge, notwithstanding the serious consequence of Mr. Malcolm's actions, pointing to his youth; his immediate acceptance of responsibility, and cooperation with RCMP; the accidental nature of the consequence of the offence itself; his relatively early guilty plea on April 16, 2008; his positive pre-sentence report, and his

lack of a criminal record. Defence counsel has concerns about any compensation for loss of employment by Mr. Parsons due to her position that these losses are not readily ascertainable. On the evidence before the Court, she has no concerns about the $118.92 which is being sought

[17] Section 730(1) of the *Criminal Code* reads that:

> Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[18] The law with respect to the application of conditional discharge as a sentencing option has been thoroughly canvassed in a number of cases. In the case of *R.* v. *Shortt*, 2002 NWTSC 47, Justice Vertes, on appeal before him, considered a number of cases and stated the following:

> All this convinces me that the fundamental aim of the discharge option is the avoidance of a criminal record. As a general proposition, discharges are granted in circumstances where the nature of the offence, and the age, character and circumstances of the offender, are such that the recording of a criminal record would be disproportionate and unjust in relation to the offence.
>
> … the first condition, that a discharge be in the best interests of the accused, pre-supposes that the accused is a person of good character without previous convictions, that it is not necessary to deter the accused from further offences or to rehabilitate him, and that the entry of a conviction may have significant adverse repercussions. The second condition, that the grant of a discharge not be contrary to the public interest, addresses the public interest in the deterrence of others. … while a need for general deterrence is normally inconsistent with the grant of a discharge, it does not

> preclude the judicious use of the discharge option. This option, however, should not be applied routinely to any particular offence (nor is it precluded from use in respect of any offence other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life).

Justice Vertes noted that previous case law held that offences involving violence are generally not available to the granting of a discharge, but that this is not meant to create an offence specific presumption that takes a certain type of offence out of consideration for a discharge.

[19] In *R.* v. *Rodrigues*, [2008] O.J. No. 2125, a case out of the Ontario Court of Justice in 2008, the Court considered a number of cases where conditional discharges were sought on offences of violence. Spies J. stated that:

> ... I have concluded that where the technical requirements are met ... the decision whether or not to grant a conditional discharge is not determined by the category of the offence. Granting a conditional discharge is not prohibited in a case ... [of] violent assault provided the two conditions required by s. 730 have been met. Having said that, as the Court said in *Sanchez-Pino*, it is only a matter of common sense that the more serious the offence, the less likely it will appear that an absolute or conditional discharge will ... “not [be] contrary to the public interest”.

[20] Spies J. noted that conditional discharges were granted in cases where serious personal injuries resulted from a single punch that was considered to be an impulsive act - this is in paragraph 37 - in a vicious assault where the offender stomped on the victim causing serious injuries, but was the recipient of an exemplary PSR, and did not require rehabilitation - at paragraph 38 of the decision - and where the offender caused the victim to receive serious burns but was found not to have intended to cause the harm that resulted - this is in paragraph 39. In the *Rodrigues* case itself, the discharge

was not granted. The reasons for that were set out in paragraphs 45 to 48, but clearly indicated that there were concerns about the honesty of Mr. Rodrigues. There was no remorse for his conduct, a failure to take full responsibility, and there were two assaults that took place over the same period of time.

[21] With respect to the best interest of the accused aspect of the test, it is not a prerequisite that an individual produce evidence of specific adverse consequences, such as loss of employment. That said, it does require evidence of negative consequences which go beyond those incurred by every person convicted of a crime, unless the offence is itself trivial, harmless, or otherwise inconsequential. This is mentioned in the *Shortt* case, at paragraph 32, and the *Rodrigues* case, in paragraphs 43 and 44, which states that:

> [43] That is a common thread running through all of these cases. Although the granting of a conditional discharge is obviously not limited to professional athletes and police officers, there should be some evidence before the court that the impact of a criminal conviction of the offender would be unusually harsh; for example, will prevent the offender from continuing to earn a living in his chosen profession. Where the offence can be considered trivial, this factor may be less important. As the seriousness of the offence increases, this factor becomes more significant.
>
> [44] In this case, Mr. Drummie did not offer any evidence to suggest that there would be any unusual repercussions to Mr. Rodrigues if a conviction is imposed. Although a criminal conviction is a serious matter and could impact in the future on Mr. Rodrigues's ability to find work, that is true for everyone who is convicted of a criminal offence.

[22] That said, there is a case in the Yukon, *R.* v. *Moore*, [2005] Y.J. No. 14, a decision of Judge Lilles, and in paragraph 32 of that case, and by way of background, Judge Lilles sentenced an 18-year-old offender to a conditional discharge for a charge

of possession of one half a kilogram of marihuana for the purpose of trafficking, as well as possession of brass knuckles. While the personal circumstances of Mr. Moore were favourable for the imposition of a conditional discharge, the issue in that case was the nature of the offence and the public interest in deterring others. In granting the discharge in that case, and considering the best interest aspect of the case, Judge Lilles said:

> Although no evidence has been lead on the subject, I am prepared to take notice of the fact that a criminal record, particularly one involving drugs, can have a disproportionate negative impact on employment opportunities, travel to other countries and choice of professions. Once a criminal conviction is registered in another country, there is no way to ensure that it is removed from its computer records, even where the accused is pardoned. In the exceptional circumstances of this offender and this offence, these negative consequences outweigh any public interest in entering a conviction.

[23] With respect to the public interest criteria, this involves more than just the concept of general deterrence, but includes the need to maintain the public confidence in the justice system.

> The question to ask here is would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice.

This is from the *Shortt* case in paragraph 34.

[24] The *Shortt* case dealt with a matter of domestic violence. In rejecting the conditional discharge application in that case, Justice Vertes pointed to the fact that this was a question of domestic violence. General deterrence is a significant factor, and this

was not a single, impulsive act, but this happened to be part of a recurring pattern of conduct on the behalf of Mr. Shortt.

[25] Then, again, in the *Moore* case, Judge Lilles, in dealing with this aspect of the test, emphasized the importance of general deterrence in the public interest test, but also recognized that:

> … the court should examine carefully what it purports to achieve in the name of general deterrence when sentencing an accused and should be open to [consider] alternative dispositions to achieve the same ends.
>
> It would be wrong to suggest that a discharge with appropriate conditions could not have a general [deterrence] effect.

That was in paragraphs 30 and 31. Judge Lilles also points out that as a matter of law and common sense, first offenders are entitled to favourable treatment at sentencing - this is in paragraph 19.

[26] He quotes from the case of *R.* v. *J.M.*, [2001] O.J. No. 3752, the Ontario Court of Appeal, noting that, although it is a young offender case, the reasoning is still applicable to young, adult offenders. I note, of course, that Mr. Moore was 18, and Mr. Malcolm is 25. There is a difference. He is still youthful at 25, a young adult, soon approaching that point in time in which he will no longer be considered young, but he is still youthful, with no criminal record.

[27] This case of *J.M.* was a serious schoolyard assault causing bodily harm, and the Ontario Court of Appeal said:

> We agree that an absolute discharge is not appropriate. We also agree that the sentence had to send the appropriate message to the school community. We think, however, that a conditional

> discharge followed by probation on the same terms that were imposed by the Trial Judge would just have effectively sent that message to the school community. All other considerations favour a discharge. J.M. has no criminal record and is by all accounts a peaceable and well regarded member of the community. His prospects are bright and a criminal record could adversely affect those prospects. It is also significant that J.M. did not attempt in his evidence in any way to diminish his role in the altercations.

[28] The *J.M.* case was, of course, a conviction after trial. The *Moore* case, which Judge Lilles was dealing with, and the case we are dealing with today, are guilty pleas.

[29] This is a violent offence which caused serious harm to Mr. Parsons, both physical and psychological. Mr. Malcolm has expressed remorse for his actions and accepts full responsibility for them. He is a young man without a criminal record. He has received a positive pre-sentence report and is considered to be a very low risk to reoffend. Specific deterrence is not a concern in his case, nor is there a need for him to be rehabilitated. He has received a positive reference for his volunteer work in the community; this work is ongoing.

[30] With respect to whether a discharge is in his best interests, no specific evidence was led as to any particular, foreseeable repercussion that would arise as a result of his receiving a criminal record on either his education or on his employment. That said, it is not unreasonable to consider that his coaching aspirations, as seen from his current involvement in the Yukon Boxing Association and certifications that he has achieved, could lead to him travelling outside of Canada.

[31] Considering the positive aspects of his life, his youth, and this possibility, I have no difficulty in finding that a discharge would be in Mr. Malcolm's best interests. More

difficult is the public interest criterion.

[32] The primary concern in this regard is the gravity of the harm that resulted. That said, this was an impulsive act which was not intended to cause any injury at all. It was reckless, however, and there was a significant consequence as a result on Mr. Parsons, and Mr. Malcolm must bear the responsibility for his act of recklessness.

[33] In my opinion, given the positive personal circumstances of Mr. Malcolm and the factual circumstances that exist in this somewhat unique case, notwithstanding that this is an act of violence which caused serious injury, the principles of general deterrence, denunciation, and the promotion of a sense of responsibility in Mr. Malcolm, can be met by the imposition of a conditional discharge on appropriate terms.

[34] One of the terms that will be imposed in this case is a restitution order, and quoting from the *R.* v. *Seimens* case, (1999), 136 C.C.C. (3d) 353:

> Where punishment is exacted in the form of a restitution order, there should be a corresponding reduction in other forms of punishment which might be imposed.

[35] So there will be a conditional discharge, but prior to stating the terms, the following is a consideration of the issue of restitution. Section 738(1)(b) of the *Code:*

> (b) in the case of bodily or psychological harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding all pecuniary damages incurred as a result of the harm, including loss of income or support, if the amount is readily ascertainable;

This comes into effect in the context of subsection (1), that says:

> … the court [in] imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person ...

I read that backwards, but the bottom line is that there is jurisdiction in this case to impose it. The issue is whether the damages are readily ascertainable.

[36] The authorities establish that restitution orders give effect to many of the principles of sentencing, including denunciation, specific and general deterrence, and rehabilitation.

[37] Further, s. 718(e) and (f) of the *Code* refer to two objectives of sentencing, particularly applicable to restitution orders, namely:

> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[38] This is quoting from the *R.* v. *Yates,* 2002 BCCA 583. The Court in *Yates* also said:

> … compensation [orders] should be made "with restraint and [with] caution".

That is paragraph 10 of the decision.

[39] There is a fairly detailed analysis of the principles that are applicable, and there is a quote in paragraph 11 from the decision of Mr. Justice Huband in the earlier referred to *Seimens* case, summarizing the principles that:

> (1) The constitutional justification for a provision in the Code permitting restitution orders is that restitution is a part of the punishment. Where punishment is exacted in the form of a restitution order, there should be a corresponding reduction in other forms of punishment which might be imposed. In some cases, a restitution order will be a significant factor, while in others it will be trivial, depending on the circumstances, but it must be included as a factor in the totality of the punishment imposed.
>
> (2) The means of the offender are to be considered as an important factor in determining whether restitution should be ordered.
>
> … the means of the offender is a factor to be considered, but … it is not a controlling factor in every case.

[40] Martin J.A. is quoted as stating in *R.* v. *Sherer* (1984), 16 C.C.C. (3d) 30:

> It may be that in some cases it would be inappropriate and undesirable to make a compensation order in an amount that it is unrealistic to think the accused could ever discharge.
>
> (3) The impact of a restitution order upon the chances of rehabilitation of the accused, either pro or con, is a factor to be considered. …
>
> A compensation order which would ruin the accused financially, thus impairing his chances of rehabilitation, should not be imposed;
>
> (4) The shorter the sentence, the more likely it will be that a restitution order will be appropriate. Where the amount is manageable, there is every reason to impose an order of restitution when a sentence either does not involve [punishment] or is so short that it does not affect the offender's employment or the sentence can be served conditionally. Conversely, as an incarceratory sentence becomes longer, the futility of an order of restitution will become increasingly apparent.
>
> (5) An order of restitution need not be for the full amount of the loss. ... in R. v. Ali …, a restitution order of

> $42,500 was reduced by the British Columbia Court of Appeal to $10,000 to better reflect the accused's capacity to meet the obligation which the order imposed.
>
> (6) Difficulties in determining the amount of the victim's loss will militate against a restitution order since it would be unwise for a criminal court to become involved in the determination of damages.

[41] Paragraph 12:

> It is apparent from several of the authorities relating to restitution orders that, while ability to pay restitution is a factor which should be taken into account by the sentencing judge, it is not the predominant factor in certain types of cases.

Paragraph 15:

> Future ability to pay is also an important factor in determining whether a restitution order is appropriate. In R. v. Hoyt …, Mr. Justice Wood, speaking for the majority, discussed the importance of the offender's future ability to pay compensation at paras. 34-5 of the decision:
>
>> While recognizing that the offender's means to pay cannot be ignored, the key to a fair use of such orders will lie in taking a broad approach to what constitutes such means. In any such inquiry, the offender's future ability to earn will be at least as important, if not more so, than his or her present means to pay.

[42] Further reference is made in paragraph 17, 20 of that decision, and many of these same principles are also brought forward in the case provided by counsel of *R.* v. *Devgan* (1999), 136 C.C.C. (3d) 238, a decision of the Ontario Court of Appeal from 1999.

[43] Defence counsel has argued that the amounts claimed on behalf for Mr. Parsons are not readily ascertainable, other than the $118.92 for actual costs incurred by Mr.

Parsons, for which he has provided receipts. Although my initial thoughts on the matter expressed similar reservations, Crown counsel was able to elaborate on the documents filed to alleviate some of these concerns.

[44] It is clear on the evidence that Mr. Parsons suffered a loss of employment from December 27, 2007, until March 1, 2008. The hours he was to work and the wage he was to be paid for that time period are provided by way of letter from his intended employer. This amount is readily ascertainable at $8,096. He was cleared to work at light duty as of March 1, 2008, but did not commence working until April 1, 2008.

[45] Given that there was no evidence before me as to what efforts he made to secure employment from March 1st until April 1st in order to mitigate his damages, and, I want to make it clear, it should not be viewed as my saying that he should have done so, given the serious nature of his injuries. This time period would appear to be something which would more properly be the subject of civil proceedings and additional evidence. As such, there will be no order for restitution for this latter time period.

[46] With respect to the remaining amount claimed, and considering the legal authorities, the harm suffered by Mr. Parsons, the personal, financial, and other circumstances of Mr. Malcolm, and the principles of sentencing, in particular, the fact that he is receiving a conditional discharge for this offence, there will be an order for restitution payable to Mr. Parsons in the amount of $5,000. The terms of the probation order.

[47] MR. KOMOSKY: I'm sorry, Your Honour, what was that amount?

[48] THE COURT: $5,000, and just to elaborate further, when we are considering all of the aspects and the issues of a case such as this, and in balancing the principles of making reparation for some extent and yet recognizing the previous good character, this is a decision recognizing that full restitution is not necessarily to be ordered in every case, even where the amounts are readily ascertainable, and the fact that there remains, still, the ability for civil proceedings to establish the further losses and any further claim over and above this. This is an amount which I feel balances the appropriate principles.

[49] The terms of the probation order. The order is going to be for 24 months. The reason it is going to be so long is to account for restitution. There will be the statutory terms:

1. To keep the peace and be of good behaviour;
2. To appear before the Court when required to do so by the Court;
3. To notify the Court or the Probation Officer in advance of any change of name or address, and promptly notify the Court or Probation Officer of any change of employment or occupation;
4. To remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
5. To report to a Probation Officer within two working days, and thereafter when and in the manner directed by the Probation Officer;
6. For the first three months of this order, to abstain absolutely from possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified

medical practitioner;

7. For the first three months of this order, not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

8. To take any assessment, counselling or programming as directed by your Probation Officer;

9. To have no contact, directly or indirectly, or communication in any way with Jim Parsons, except with the prior written permission of your Probation Officer, in consultation with Victim Services;

10. To perform 120 hours of community work service as directed by your Probation Officer or such other person as your Probation Officer may designate. Any hours working in a volunteer capacity at the Boxing Association can be counted towards this 120 hours;

11. To make restitution by paying into Territorial Court the amount of $5,000 in trust for Jim Parsons, in the amount of $200 per month, with the entire balance to be paid by the end of the probation order;

12. To participate in such educational or life skills programming as directed by your Probation Officer;

13. To make reasonable efforts to find and maintain suitable employment, and provide your Probation Officer with all the necessary details concerning your efforts;

14. To provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling,

employment, or educational activities that you have been directed to do pursuant to this probation order.

[50] With respect to the length of this order and the issue of restitution, it is long. The reason it is long is in order to allow for restitution to be paid.

[51] There is a case in this jurisdiction, *R.* v. *Mervyn*, 2003 YKTC 34. It was a sentencing by Judge Lilles. It went to the Court of Appeal. There was a post-sentence report filed; fairly serious injuries. There was an amount for damages that was ordered in restitution for loss of property and income. Not income in that case, I do not believe, but there was a loss established because of the dental work that was done, a significant amount.

[52] The Court of Appeal noted in the *Mervyn* decision, in viewing the post-sentence report, that Mr. Mervyn had, in fact, rather than waiting the entire length of the probation order that was structured for this, went out and obtained a bank loan and paid off the victim in that case immediately and made his payments to the bank instead, and this was noted as a very favourable step on his part that weighed in his favour when the Court considered a sentence that it otherwise said was at the low end when it was initially imposed. So they did not change the sentence.

[53] It may be, in a case like this, if Mr. Malcolm wishes to shorten the length of his probation order, he may wish to consider other ways to ensure that Mr. Parsons receives the funds that he is entitled to as a result of this judgment. That is simply an option to consider, because I am certainly prepared, after some period of time has taken place, to consider shortening the order if I can be satisfied that the restitution has been

paid in full.

[54] There will be an order of forfeiture with respect to the sword that caused the injury.

[55] There will be a DNA order. There will not be a firearms order, and because I wish the focus to be on the restitution, the victim fine surcharge will be waived.

[56] Is there anything else?

[57] MS. CUNNINGHAM: If I could just have one moment. Yes, Your Honour, just in terms of the payments, my client is not sure if he would be eligible for a loan, and he is not sure that he would be able to meet the $200 a month payment, based on his income and payments with his family unit right now. So his request would be for a longer probation order, at this time, in the amount of three years so that his monthly payments could be less, because he doesn't think he could actually make a $200 payment a month, and isn't sure yet if he would be eligible for a loan. Now, he might be eligible for a loan, and that might be different, and then he could come back before you to request it be shortened. That's just his request.

[58] THE COURT: What I would prefer to see, in that case, and the law on the issue of restitution is that it is a consideration of all the assets and all the abilities that exist, would be for Mr. Malcolm to come back on a review.

[59] MS. CUNNINGHAM: I have -- well, I have those amounts now. In case you were going to ask about that, I do have amounts of his income versus his payments monthly, and we could look at that today if that --

[60] THE COURT: There is his income, there is the entire household income, and there is the entire household debt.

[61] MS. CUNNINGHAM: Yes, he has that here.

[62] THE COURT: Then there is the possibility of whether he can explore other means. What is he suggesting he can pay?

[63] MS. CUNNINGHAM: On second thought, if we could -- we can leave it the way it is, and come back before you if there's an issue.

[64] THE COURT: Yes, I am quite -- I would prefer to leave it that way. So there can be a review brought, if necessary, and we can look at this term.

[65] MR. KOMOSKY: Your Honour, just the issue of the no contact order, two thoughts. First, Victim Services has not been involved in this matter, so I would suggest their consultation is not necessary, and --

[66] THE COURT: So is there anyone in particular, or should I just leave it with permission of the Probation Officer after contact with the Crown witness coordinator?

[67] MR. KOMOSKY: You could, perhaps, leave it that way. As this is not a domestic violence, or there was no pre-existing relationship, I doubt that there's much interest from either party for contact in the future.

[68] THE COURT: Has the apology letter been provided?

[69] MR. KOMOSKY: Yes, it has. It was provided the morning of sentencing.

[70] THE COURT: Would there be a preference that there simply be no contact, period?

[71] MR. KOMOSKY: I guess that would be my thought. I would put a proviso, except through legal counsel, on the chance that civil proceedings are initiated.

[72] THE COURT: Any thoughts?

[73] MS. CUNNINGHAM: If Mr. Parsons is comfortable saying what his thoughts are, he is here in the court in terms of --

[74] THE COURT: I am assuming that the Crown witness coordinator is conveying those thoughts to the Crown --

[75] MS. CUNNINGHAM: Okay. I just didn’t see them talking.

[76] THE COURT: -- as I have been sort of observing what has been going on here.

[77] MS. CUNNINGHAM: Okay. I have no -- no thoughts on that.

[78] THE COURT: The no contact will read: Have no contact, directly or indirectly, or communication in any way with Jim Parsons, except through legal counsel. I am going to leave, "or with the prior written permission of your Probation Officer," because there are things that can take place in the context of legal proceedings that are grey, and I doubt that that permission will be given. I am going to say, "of your

Probation Officer, after consultation with Jim Parsons." That way, at least, if something comes up, it is there, and Mr. Parsons will have direct involvement himself in any permission that is going to be given, and so nothing is happening around him.

[79] The other charges were dealt with already; is that correct?

[80] MR. KOMOSKY: I don’t believe so. I would apply to withdraw them at this time.

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COZENS T.C.J.