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CANADIAN SENTENCING DIGEST QUANTUM SERVICE Nadin-Davis & Sproule Release No. 5, April 2024

This release brings you a wealth of new case law digests covering a wide range of offences, with an emphasis on updates to Chapter 4 (Offences Against the Criminal Code). The following are of particular interest and importance:

- **OFFENCES AGAINST THE PERSON AND REPUTATION—ASSAULTS—Assault with a Weapon**—The accused, aged 19, pleaded guilty to aggravated assault. He had an argument with his mother's ex-boyfriend and in defending himself cut the victim's thumb with a knife that he had grabbed. The injury did not require medical attention at the hospital. The accused had a positive PSR. He had no criminal record. He had a difficult upbringing with mental health and addiction struggles since his teens but had made significant strides toward improving his life. He was employed with a boat building company and his employer spoke highly of him. Alcohol had been an issue, but the accused said that he was no longer drinking. The accused had family support. The accused's counsellor stated that the accused was doing well and that he showed insight into his past and the problems that alcohol had caused for him. Although the injury to the victim's finger was an aggravating factor, the Crown had described it as "trifling". The mitigating factors included that the accused had sought help for his alcohol problem and mental health issues; had no criminal record; and had a very difficult upbringing. When weapons are involved, in this case a knife, deterrence and denunciation are important factors in sentencing.

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- The Crown and defence counsel recommended a conditional discharge followed by a 24-month period of probation, but the trial judge rejected the joint recommendation and instead imposed a sentence of 24 months' probation only. The accused appealed. The issue for the appeal was whether the trial judge erred in law in refusing to accept the joint recommendation and imposing a suspended sentence rather than a conditional discharge. The test in the *Anthony-Cook* decision was properly set out by the trial judge: a trial judge should not depart from a joint submission unless the sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. The *Fallowfield* test for the granting of a discharge references the public interest. The discharge had to be considered first and foremost as a joint recommendation. Campbell J. noted that the trial judge's review of the matter was based on whether the discharge was contrary to the public interest. That would have been the proper test to apply in the absence of a joint recommendation. However, the joint recommendation added another level of analysis. That was, a consideration of whether the recommendation that a discharge was not contrary to the public interest was so misguided, or "out of line", or "unhinged from the circumstances of the offence and the offender" that it was not just wrong, but so wrong, that it would cause reasonable people to believe that the criminal justice system had broken down or ceased to function properly. The court concluded that the joint recommendation for a discharge was not unreasonable or unhinged from the circumstances. The oversight in the case was that the two tests, *Anthony-Cook* and *Fallowfield*, should be applied separately. The appeal was granted. The suspended sentence was set aside, and a conditional discharge was granted: *Susin v. R.*, 2023 CarswellNS 753 (N.S.S.C.).
- **OFFENCES AGAINST THE PERSON AND REPUTATION—ASSAULTS—Assault**—The accused, an R.C.M.P. constable, pleaded guilty to assault. She responded to a call about a possible suicidal female. She found the victim laying on her side in the bathroom. She had consumed Tylenol, melatonin and alcohol and there was evidence of self-harm inflicted with a box cutter. When the accused did not get up as directed by the constable, she arrested the victim under the *Mental Health Act* and placed her in handcuffs. A struggle ensued. The assault occurred when the accused decided to drag the victim down the hallway into, and then out of an elevator, and into the front lobby. The victim was wearing only a bra, leggings, and socks. She pushed the victim's head down with her foot and also picked the victim's head up by the hair. The events were caught on surveillance camera. These incidents of assault were contrary to R.C.M.P. training and were not reasonable or necessary in the circumstances. The victim suffered some abrasions, lacerations and bruising. The Victim Impact Statement detailed that she suffered ongoing physical and emotional trauma and undertook counselling at her expense. The accused was Indigenous. The *Gladue* report stated that the accused, as a child and youth, experienced poverty, physical, sexual, and mental abuse, family and community violence, instability, criminal behaviour, and the normalization of substance abuse and violence. She was neglected or abandoned by her mother and was often left to raise herself and her sister. The accused was disconnected from her culture which she regretted. She was an extremely hard worker. She often worked more than one job before joining the R.C.M.P., about 15 years before the incident, where she worked on the frontline. The accused's job had taken a toll on her mental and psychological health. This may have been compounded by a suspension and reprimand in connection with a romantic relationship with a fellow police officer. The accused was facing disciplinary action by the R.C.M.P. regarding the present incident. When sentencing a police officer the paramount sentencing principles are deterrence and denunciation. A sentence for a police officer is generally more severe than that of an ordinary person due to the breach of trust. The accused had acted with excessive force in the discharge of her duties and in response to a

report of a person in a mental health crisis. It was an aggravating factor that she used excessive force on a vulnerable person. However, the accused's attendance may have saved the victim's life. The accused was extremely remorseful and had shown insight into her actions. The court found that the accused had been specifically deterred by being charged with the offence, the criminal process that followed, the effect it had on her career, and the public outcry. The court also found that the effect of public stigmatization that occurred through the social media had a deterrent effect on the constable and any other officer responding to a mental health crisis. The accused's moral culpability fell in the middle range. A custodial sentence was not required but this conclusion did not condone the constable's treatment of the accused. The court said that the accused's actions were criminal and highly inappropriate in her arrest of the accused under the *Mental Health Act*. Her actions highlighted what should not occur when a police officer responds to a person in a mental health crisis. Dickey Prov. J. was satisfied that a discharge on terms could satisfy the sentencing principles including the primary sentencing principles and was not contrary to the public interest. The terms included significant community work service hours. The court imposed a conditional discharge for a period of two years: *R. v. Browning*, 2023 CarswellBC 2690 (B.C.P.C.).

- **OFFENSIVE WEAPONS—ASSEMBLING, ETC—Possession of Firearm While Prohibited**—The accused, aged 43, pleaded guilty to possession of cocaine and methamphetamine for the purpose of trafficking contrary to the *Controlled Drugs and Substances Act*, possession of property obtained by crime, over \$5,000., and possession of ammunition while prohibited from doing so. As part of a drug investigation, the accused was observed meeting with known drug traffickers and on various occasions was seen delivering and receiving items in sports or duffel bags at locations where drug deals were made and was seen holding a stack of money. A search turned up five kilograms of methamphetamine, 46.5 grams of cocaine, other drugs, two 12-gauge shotgun shells, a Taser, cash and drug paraphernalia. The accused was Indigenous. He told the author of the PSR that he had a good relationship with his mother, but much less so with his father whom he described as abusive. His parents separated when he was 10 years old. He dropped out of school in grade 10 and went to work on a pipeline. He suffered a work injury at age 19, was on disability benefits and pain medication for about 3 years, after which he had difficulty coping. He turned to illicit drugs, primarily methamphetamine and became a regular user, with some limited periods of sobriety. He committed crimes to support his drug habit and engaged in drug dealing from time to time. He had a short but significant criminal record, including a 6-year sentence for manslaughter. He had a long history of negative peer associations. Although the accused did not have an extensive connection to his Indigenous heritage, he expressed the hope to return to the simpler lifestyle at Sturgeon Lake Cree Nation some day. His *Gladue* factors included some intergenerational effects from family members being part of the residential school system and the “60's scoop”. Associated with the objectives of denunciation and deterrence in this case, was the principle of parity, which touched upon determining the appropriate sentences for methamphetamine trafficking. The aggravating factors included the quantity of the substances found. The mitigating factors included that the accused's own methamphetamine addiction played a significant role in his involvement with the operation. An issue arose about the paucity of published Saskatchewan authorities on sentences for offences related to methamphetamine, and thus Elson J. agreed to publish this decision, wherein he provides detailed analysis and a review of the relevant authorities. A courier transporting drugs at the multi-ounce level, fell in the sentencing range of three- to six-year imprisonment, whereas where an offender held a principal or leadership role the range could be six to ten years (*R. v. Favreau*). Elson J. noted that the accused was more of an underling in this wholesale operation, greater than a runner but he clearly did not actively negotiate any transactions. The court imposed a global sentence of five years' imprisonment consisting of: five years' imprisonment on the methamphetamine traffick-

ing charge; four years concurrent on the cocaine trafficking charge; four years concurrent on the proceeds of crime charge; and two years concurrent on the weapons/ammunition offence: *R. v. Kidder*, 2023 CarswellSask 468 (Sask. K.B.).

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