NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Cromwell*, 2021 NSCA 36

Date: 20210428
Docket: CAC 496379
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Dante Warnell Cromwell

Respondent

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	November 10, 2020, in Halifax, Nova Scotia
Subject:	Sentencing. Repeated continuous breaches of a no-contact order pursuant to s. 515(12) of the *Criminal Code*. Aggravating and mitigating factors. Totality. The Crown's analytical approach on appeal as compared to its approach at sentencing. Whether the sentence for 56 s. 145(3) breaches was manifestly unfit.
Summary:	The Crown appealed the sentence imposed on the respondent of 168 days for 56 breach convictions. The respondent pleaded guilty. He admitted to having almost continuous daily contact with HM over approximately two months while on remand and subject to a no-contact order. At the time of sentencing, he was charged with, but had not been found guilty of, charges of advertising the sexual services of HM and related offences. A number of the calls made by the respondent to HM were for the express purpose of cajoling or coercing her into recanting the allegations she had made against him. Applying a totality analysis, the Crown sought an 18-month sentence. The defence asked for a sentence of 60 days. There was agreement that a remand credit of 1.5 days per day in pre-sentencing custody should apply. The Crown's

totality analysis sought 10 days' incarceration per conviction, to be served consecutively, reduced from 90 days per conviction. The sentencing judge identified 30 days' custody for each conviction, served consecutively, as appropriate. She viewed a sentence of approximately 4.6 years for this youthful, first-offender who was African-Nova Scotian to be too harsh. Applying a totality analysis, she reduced the sentences to 3 days per count, served consecutively, for a total of 168 days.

Issues:

(1) Did the sentencing judge err in law when applying the principle of totality?

(2) Was the sentence manifestly unfit?

(3) Should the Crown on appeal be permitted to adopt a different analytical approach than the approach the sentencing Crown urged the judge to follow?

(4) Should the sentence substituted at appeal be concurrent or consecutive to the penitentiary sentence imposed on the respondent in May 2020 for convictions for advertising HM's sexual services and related offences?

Result:

Leave to appeal granted. Appeal allowed, sentence varied from 168 days to 364 days, with the balance of 196 days to be served concurrently with a subsequently imposed penitentiary sentence. Justice Scanlan dissenting in part. On the issue of the Crown's changed approach on appeal, the Crown cannot now say the sentencing judge was in error for having followed the analytical approach she was urged to adopt by the sentencing Crown. The judge closely followed what the Crown recommended as the appropriate analysis. The Crown is not entitled on appeal to say she erred in doing so. Aside from her ultimate application of the totality principle, the sentencing judge made no errors in crafting the respondent's sentence. Deference is owed to her weighing of the aggravating and mitigating factors. Her calculation of 30-day sentences for each breach charge is also entitled to deference. This quantum for a s. 145(3) breach conviction is in the range.

A totality assessment naturally followed to reduce the global sentence of 4.6 years for this youthful first offender with good rehabilitative prospects. The judge's determination that a sentence of this length was unduly harsh does not warrant appellate intervention. However, her application of totality resulted in too deep a discounting of the aggregate sentence. There is no precedent for such a dramatic reduction. The respondent's conduct, which constituted a calculated attack on the administration of justice, required more emphatic repudiation. The appeal was allowed on the basis of this error.

A sentence of 364 days, that is, 6.5 days consecutive for each of the 56 breach convictions, is substituted for the respondent's original 168-day sentence. The majority held that once the respondent is given credit for the 168 days he has already served, the balance of the sentence – 196 days – is concurrent to the penitentiary sentence imposed on him in May 2020. Justice Scanlan dissented on this issue and would have ordered the respondent to serve the 196 days consecutive to his May 2020 penitentiary sentence for convictions for advertising HM's sexual services and related offences.

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Respondent

Restriction on Publication: Pursuant to Sections 486.4(1) of the *Criminal Code*

Judges:	Derrick, Fichaud, and Scanlan, JJ.A.
Appeal Heard:	November 10, 2020, in Halifax, Nova Scotia
Held:	Leave to appeal granted. Appeal allowed, sentence varied per reasons for judgment of Derrick, J.A.; Fichaud, J.A., concurring; and Scanlan, J.A., dissenting in part.
Counsel:	Glenn Hubbard, for the appellant Colin James Coady, for the respondent

Order restricting publication – sexual offences

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

(a) any of the following offences:

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

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

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

Reasons for judgment:

Introduction

[1] This appeal concerns the fitness of the sentence imposed on Dante Cromwell for 56 counts of failing without lawful excuse to comply with a no-contact order, contrary to s. 145(3) of the *Criminal Code*. That order was imposed when Mr. Cromwell was remanded into custody on charges that included advertising an offer to provide the sexual services of a 17-year-old girl, HM.

[2] Mr. Cromwell had been arrested on December 17, 2018, and was denied bail on December 21, 2018. The court directed, pursuant to s. 515(12) of the *Criminal Code*, that Mr. Cromwell was not to communicate directly or indirectly with HM.

[3] Notwithstanding the order, Mr. Cromwell had almost continuous daily telephone contact with HM between February 25 and April 30, 2019, inclusive. During this time he made 170 calls over 56 days.

[4] Mr. Cromwell ultimately pleaded guilty to the 56 counts of breaching the no-contact order. The Crown sought an 18-month sentence, less Mr. Cromwell's remand credit. The defence asked for a sentence totalling 60 days.

[5] The only agreement on sentence was that Mr. Cromwell should receive an enhanced remand credit of 330 days – 1.5 days for each day he had spent in pre-sentence custody between the time of his arrest on the breach charges, June 4, 2019, and his sentencing on January 9, 2020.

[6] Justice Darlene Jamieson determined the appropriate sentence was 30 days' custody for each of the 56 counts to be served consecutively (reported 2020 NSSC 14). This amounted to 1680 days or approximately 4.6 years. Applying a totality analysis, she reduced the sentences to 3 days per count to be served consecutively for a total of 168 days. She found that with the application of his remand credit, Mr. Cromwell had served the sentence.

[7] The Crown says the judge made material errors and crafted a manifestly unfit sentence. While I do not agree the judge made all the errors alleged, as I will explain, I am of the view her application of the totality principle produced a manifestly unfit sentence that warrants appellate intervention.

The Crown Appeal of Mr. Cromwell's Sentence

[8] On appeal, the Crown is seeking to have Mr. Cromwell sentenced to 18 months, to be served concurrently with a term of imprisonment he received on May 15, 2020. That subsequent sentence, following Mr. Cromwell's guilty pleas to charges of advertising the sexual services of HM and related offences, netted him a go-forward sentence of 2 years and 211 days after credit for his time on remand had been taken into account.

[9] Although, as I mentioned, an 18-month sentence is what the Crown asked Justice Jamieson to order for the breach convictions, on appeal the Crown took a new approach to Mr. Cromwell's sentencing and sought additional state control over him in the form of a three-year probation term after his release from prison.

[10] The Crown says the approach the judge took to crafting Mr. Cromwell's sentence was flawed. Other than her totality calculation, it was the approach she had been urged to adopt. In the Crown's submission, had the judge not made these errors, she would have inexorably found her way to ordering Mr. Cromwell to serve a longer period of imprisonment.

[11] The sentencing Crown arrived at 18 months as the appropriate term of imprisonment for Mr. Cromwell after applying the principle of totality. Totality is a "last look" at the global effect of consecutive sentences. The judge started out with a lower global sentence and applied a larger totality discount. The Crown says this too was an error. I will be addressing totality later in these reasons.

[12] Before discussing the judge's application of the totality principle, I will first examine: (1) the approach the sentencing Crown asked her to take; (2) the approach she took and how she weighed various relevant factors; and (3) whether it can now be said the judge erred in her analysis.

The Sentence Proposed By the Crown at Sentencing

[13] The 18-month sentence sought by the Crown reflected its position on the application of the totality principle. The Crown approached its sentencing calculus as follows: 90 days' custody for each breach, to be served consecutively. As this would have produced a clearly excessive sentence of approximately 14 years, the Crown applied the totality principle to reduce the custodial time for each count to 10 days. The result was a proposed sentence of 560 days or 18 months.

[14] The Crown agreed Mr. Cromwell was entitled to have the enhanced remand credit of 330 days applied to reduce the time to be served to 230 days.

The Sentence Proposed by the Defence at Sentencing

[15] The defence proposed a 60-day global sentence for Mr. Cromwell, calculated as follows:

- the first 23 charges for February 25 through March 26, 2019 would attract 30 days' custody each, to be served concurrently to each other.
- each of the remaining 23 charges for April 3 through April 30, 2019 would attract 30 days' custody, served concurrently to each other but consecutive to the other sentences, for a global sentence of 60 days.

[16] The defence said the 8-day hiatus in the calls from March 26 to April 3, 2019, justified the consecutive sentencing. Given Mr. Cromwell's enhanced remand credit, in the submission of the defence, his 60-day sentence had been served.

The Sentencing Crown's Approach

[17] The Crown's written submissions to the judge emphasized:

- The need for Mr. Cromwell's sentence to reflect denunciation and deterrence.
- The aggravating factor of Mr. Cromwell having used some of the calls to urge HM to contact the Crown Prosecutor to say she had lied in her complaint and provide explanations for the evidence against him.
- The relevance of Mr. Cromwell not contacting HM for a week as soon as he learned the police knew about and had recordings of the calls. When he resumed calling HM, Mr. Cromwell used a different phone number that he must have obtained from a separate source.
- The application of s. 725(1)(c) of the *Criminal Code* that allows evidence of uncharged offences to be admitted at sentencing for the limited purpose of showing the background and character of the offender. Relying on s. 725(1)(c), the Crown argued that the content of a

> call on April 30, 2018 to HM constituted luring under s. 172.1 of the *Criminal Code*. The Crown noted in its written submissions to the judge that, "Pursuant to s. 725(1)(c) evidence of uncharged offences is admissible at the sentencing hearing for the limited purpose of showing the background and character of the offender, which is a live issue at sentencing hearings…"

- The appropriateness of the sentences for each breach being served as consecutive, not concurrent sentences.

[18] The Crown did not ask the judge to differentiate amongst the counts in the Indictment. The sentencing Crown did not take the position now being advanced that some breach charges should attract higher sentences because of the aggravating content of calls on that day.

The Judge's Application of the Principles of Sentencing

[19] After reviewing the purpose and principles of sentencing set out in ss. 718, 718.1 and 718.2 of the *Criminal Code*, the judge identified mitigating and aggravating factors. She noted that Mr. Cromwell had pleaded guilty well in advance of trial, saving time and resources, and sparing HM from testifying. She viewed the guilty pleas as demonstrating an acceptance of responsibility, "part of the foundation necessary for an offender to rehabilitate themselves". She saw value in the guilty pleas, notwithstanding the Crown's argument that their mitigation was attenuated by the overwhelming evidence of Mr. Cromwell's guilt, in the form of the recorded telephone calls.

[20] Other mitigating factors that resonated with the judge were: Mr. Cromwell's allocution at sentencing, expressing remorse to the court and to HM; his relative youth – he was 22 at sentencing; his family support; the fact that he had led a pro-social life and had no criminal record; his employment history; his participation in programming while on remand; and his "insight and sincerity regarding self-improvement" as evidenced in the pre-sentence report. The judge found: "On the facts that are before the Court, Mr. Cromwell has high prospects of rehabilitation".

[21] The judge noted the emphasis on restraint as a principle of sentencing for youthful first offenders, citing Justice Rosenberg's statement in *R. v. Priest*, [1996] O.J. No. 3369:

> [23] …a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence…

[22] The judge took account of the fact that Mr. Cromwell is African-Nova Scotian and that, as a result of systemic racism, there is an overrepresentation of African Canadians behind bars in Canada. She did not have an Impact of Race and Culture Assessment before her – Mr. Cromwell had indicated through counsel he was content to proceed to sentencing on the basis of the pre-sentence report alone – and did not comment further on the issue of Mr. Cromwell's status as racialized person.

[23] The judge took account of the aggravating circumstances in Mr. Cromwell's case, "as outlined by the Crown". She detailed them: the number of times and length of time over which Mr. Cromwell contacted HM; the "concerning" content of some of the calls; planning and deliberation; and the bad character reflected by the luring call. She commented on each of these aggravating circumstances.

[24] The "concerning content" calls:

> [53] … I find that the content of some of the calls is concerning and represents aggravating circumstances. For example, when [HM] does not pick up the phone when Mr. Cromwell calls on March 16, 2019 (March #67) he says to her: "I should jump through the fucking phone and get you." The calls also include exhortations to [HM] to advise the Crown Attorney's office she had been lying and to come up with explanations for evidence against Mr. Cromwell. He tells [HM] to say she lied due to feeling intimidated. He tells [HM] that, if she tells the Crown she wants to drop it, she is likely to get, at most, a "slap on the wrist", maybe a fine. He says that it will only be a youth record (March #1, 3/4/19; March #26, 3/7/19; March #47, 3/13/19; March #51, 3/13/19). The fact that [HM] consented to the contact is not a mitigating factor.

[25] Planning and deliberation:

> [54] There was also planning and deliberation. Mr. Cromwell directed [HM] on how to set up a payment card using a fake name and address (March #49, 3/13/19) and advised that, once she went to the Crown, she would need to get a new phone (March #51, 3/13/19). He had (and also further contemplated having) third parties involved in executing the calls. During one call (March #38, 3/11/19) Mr. Cromwell refers to having had his buddy call [HM] because he was on "a level". In another call he says that the last week before trial either he won't call or he will use someone else's PIN (March #26, 3/7/19).

> [55] It is important to note that Mr. Cromwell is not being sentenced for obstruction of justice; however, the nature of the various calls and the period over which they occur is an aggravating factor for sentencing.

[26] The "luring" telephone call:

> [56] The Crown submits that the content of the telephone call made by Mr. Cromwell to [HM] on April 30, 2018 (audio April #58) is evidence of an uncharged offence and is admissible under s. 725(1)(c) of the *Criminal Code*. The Crown submits the communication constitutes luring within the ambit of s. 172.1 of the *Criminal Code*. The Crown says there is a sufficient nexus between the facts of the uncharged offence and the charged offence because it concerns the same complainant and is part of the same circumstances. The Crown submits that evidence of the uncharged offence is relevant to Mr. Cromwell's character and the circumstances of the offence. The Crown referred to the Ontario Court of Appeal decision in *R. v. Edwards*, [2001] O.J. No. 2582, where the Court said that evidence that discloses the commission by the offender of another untried offence is admissible for the purpose of showing the offender's background and character, as that background and character may be relevant to the objectives of sentencing (paras. 63 and 64).

[27] The Crown asked the judge to take the luring call into account as an aggravating factor through the operation of s. 725(1) of the *Criminal Code*. Section 725(1)(c) provides that in determining sentence, a court may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge.

[28] The judge accepted this was relevant to Mr. Cromwell's sentencing. She noted the statement in *R. v. Larche*, 2006 SCC 56, by Justice Fish that s. 725(1)(c) "…dispels any uncertainty whether a sentencing judge can take into account as aggravating factors other uncharged offences that satisfy its requirements".

[29] The call the judge was asked to treat as aggravating occurred on April 30, 2018, and involved Mr. Cromwell asking HM to install an app that would facilitate her transmitting photographs he requested of her "pussy" and "boobs". On April 30, 2018, HM was still 17. She would turn 18 on May 5.

[30] The judge accepted the facts of the April 30 call constituted part of the circumstances of the offending conduct to which Mr. Cromwell had pleaded guilty. She found the content of the call could establish the basis for a separate charge of luring under s. 172.1 of the *Criminal Code*.

[31] As I noted earlier, the sentencing Crown's submissions on the uncharged luring offence focused exclusively on the April 30 call and its admissibility to show Mr. Cromwell's bad character. They did not rely on any other calls or seek to have the uncharged offence of luring amplify the sentences to be imposed on specific breach charges. They sought uniform sentences for each breach, including the breach charge that included the April 30 call.

[32] The judge also outlined points made by the defence:

- Many of the calls did not involve Mr. Cromwell urging HM to retract her allegations that had led to the advertising HM's sexual services and related charges.
- Many calls were between two unsophisticated young people "trying to navigate a relationship" (para. 30).
- The breaches did not involve new substantive charges which is what characterizes higher-end breaches.
- The Crown had under-emphasized the mitigating factors, only referencing them when questioned by the court at the sentencing hearing.
- There is an "extremely broad" sentencing range for s. 145(3) offences, the majority of which are dealt with in Provincial Courts "via unreported oral decisions" (para. 33).

[33] The judge found that Mr. Cromwell's moral culpability was high. She concluded that imprisonment was a necessary consequence:

> [66] I now turn to what is a fit and proper sentence in the present circumstances. First of all, I must be slow to sentence this first offender to imprisonment. However, it is my view that Mr. Cromwell's moral culpability or blameworthiness here is significant. This is highlighted by the sheer number of offences, the uncharged offence, the repetitive nature of the conduct and it being over a lengthy period of approximately three months. Keeping in mind for a youthful, first offender the considerations of individual deterrence and rehabilitation, I am of the opinion that no other sentence but imprisonment is appropriate.

[34] The judge addressed the issue of parity, and commented on the cases referred to by counsel – *R. v. Atkinson*, 2010 YKSC 56; *R. v. Emmelkamp*, 2013

ABCA 71; *R. v. Hanlon*, 2016 NSPC 32; and the March 21, 2019 unreported decision, *R. v. Downey*, a joint recommendation:

> [42] These sentencing decisions from previous cases are used simply as a guide for judges in fashioning an appropriate sentence. The purpose of a range is to encourage greater consistency between sentencing decisions, in accordance with the principle of parity prescribed by the *Criminal Code*. Section 718.2(b) states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." I note that none of the cases provided by counsel deal with a youthful first-time offender.

[35] Both Crown and defence had indicated they were unable to locate any Nova Scotia cases similar to Mr. Cromwell's. The Crown told the judge that the cases from other jurisdictions were not truly comparable as they did not involve such a significant number of breaches.

The Sentencing Judge's Decision

[36] The judge acknowledged the challenge that lay before her:

> [68] Mr. Cromwell's 56 offences challenge this Court to craft an appropriate total sentence considering the proper assessment of the sentence for each individual offence, the consideration as to whether the sentences should be served concurrently or consecutively, and the principle of totality, to ensure the sentence is not excessive in the circumstances.

[37] The judge concluded that 30 days' incarceration for each breach was appropriate, having taken into account the aggravating and mitigating factors. She agreed the sentence should be consecutive. She rejected the defence argument for concurrent sentences:

> [72] I do not agree with Defence counsel that the entire chain of events which occurred from February 25, 2019 to March 26, 2019 should be treated as one event and hence sentences should be served concurrently. I also do not agree that the offences occurring between April 3, 2019 and April 30, 2019 should be treated as one continuous event. While the conduct giving rise to the charges arose through a series of closely related events, the offences represent intentionally reoffending behaviour over a very lengthy period of time. I consider each day to be separate and distinct. They were not several calls over a few days but were 170 calls over an approximate three-month period. The 170 calls represent a serious, flagrant and repeated disregard of the court order and the Court's authority. The calls were pre-meditated and required planning. On each occasion, Mr. Cromwell made an intentionally conscious decision to re-enter his

> PIN in order to call [HM], knowing the call was in breach. Each call represented a separate bill or cost. In addition, he took steps to avoid being found out. He discussed having [HM] purchase a new phone after she went to the Crown, changing his PIN, and employing the assistance of third parties to reach [HM].

[38] The global sentence totaled 1680 days or approximately 4.6 years. The judge then looked at this number through the lens of the totality principle in s. 718.2(c) of the *Criminal Code* which requires consideration of whether a sentence is "unduly long or harsh" as result of the combined effect of consecutive sentences.

[39] Referring to this Court's decision in *R. v. Adams*, 2010 NSCA 42, the judge understood she was to assess whether the total sentence was proportionate to the gravity of the offending and the degree of Mr. Cromwell's responsibility. She concluded:

> [76] It is my opinion that the application of the totality principle demands reduction of the cumulative sentence. A sentence of 1,680 days would be a crushing sentence far exceeding the overall culpability of Mr. Cromwell. Keeping in mind Mr. Cromwell's moral blameworthiness, in my opinion, a fit and proper sentence in the present circumstances would be three days per offence, representing a global sentence of 168 days. This sentence is in keeping with Mr. Cromwell being a youthful, first-time offender with high rehabilitative prospects.

[40] The final result was a sentence of 3 days' imprisonment for each of Mr. Cromwell's 56 breach convictions, to be served consecutively for a total sentence of 168 days. The Crown did not mention, and the judge did not impose, any probation to follow.

The Crown's Position on Appeal

[41] The Crown says Mr. Cromwell's sentence is the result of a constellation of errors. The judge misapplied the totality principle. She was incorrect to have described the 1680-day sentence (56 breaches x 30 days each) as "crushing", without conducting a contextualized, individualized analysis. She then did not adequately explain her very significant reduction of the sentence she identified as appropriate. She imposed a manifestly unfit sentence and did not properly emphasize denunciation and deterrence with respect to breach calls that included violence, obstruction of justice or child luring behaviour, even though she accepted the applicability of s. 725 of the *Criminal Code* to Mr. Cromwell's sentence. The Crown says the judge fell into error by imposing the same sentence for each breach when the aggravating content of the calls was not uniform.

[42] The Crown says the judge was led into error by the sentencing Crown and now submits the judge should have weighted the calls differently, depending on their content, with the result that Mr. Cromwell would have received a higher sentence.

[43] The Crown says the following at paragraph 55 of its factum:

> The Appellant is at a loss as to how the punishment for each count in the Respondent's case was divided equally…It is very clear that some of the individual counts contained far more aggravating circumstances than other counts.

[44] The judge divided the punishment for each count equally in accordance with the approach the sentencing Crown had advocated.

[45] The Crown argues at paragraphs 69 and 70 of its factum that "…more aggravated breaches of court orders, that strike at the heart of the administration of justice, require a stronger sanction" as do "breach offences that have been found, pursuant to section 725 of the *Criminal Code*, to have the additional aggravating circumstances of child luring". The submission that the judge should have differentiated amongst the breaches is at odds with the Crown's submission at sentencing.

[46] The Crown says the sentence should have looked like this:

- 30 days for the "lesser breaches".
- 90 days for the breaches that included calls involving "violent, threatening or controlling behaviour".
- 180 days for breaches that included calls involving "elements of obstruction of justice".
- 180 days for the April 30 "luring" call (Appellant's factum, paras. 97-100).

[47] The Crown also takes a different stance on the issue of consecutive versus concurrent sentencing. In its fresh approach to Mr. Cromwell's sentence, the Crown now proposes concurrent sentences, "in order to bring the global sentence in line with the principle of totality" (Appellant's factum, at para. 101). The Crown's proposed recalibration produces an 18-month global sentence. In the Crown's submission:

> …by breaking the sentence down as proposed above, proper effect is given to the gravity of each individual offence, while at the same time, respecting the principle of totality.
>
> This sentence would have more accurately recognized and reflected the sheer volume of criminality as well as the premeditated elements, threatening conduct and other unique aggravating factors included within some, but not all, of the 56 counts before the Court (Appellant's factum, para. 106 and 107).

[48] The Crown's path on appeal to an 18-month sentence is quite different from the approach advocated at sentencing, which the judge had found persuasive. It does not involve a "last look" at the effect of consecutive sentences. It seeks to fix Mr. Cromwell's sentence at 18 months on the basis of making the breach sentences concurrent to each other. This approach does not invoke the totality principle. The totality principle is only applied where consecutive sentences have been imposed (s. 718.2, *Criminal Code*; *R. v. Skinner*, 2016 NSCA 54, at para. 47).

[49] The Crown now also proposes that Mr. Cromwell's sentence include a 3-year probation order to address the "consequential harm" he caused. The sentencing Crown never asked the judge to impose supervision in the community to follow Mr. Cromwell's incarceration.

[50] The Respondent argues the Crown should not be permitted to repudiate on appeal the position it took before the sentencing judge. The Crown says its stance on appeal is not a repudiation: it is an approach that should guide our analysis in circumstances where the judge was led into error by the Crown at sentencing.

Issues

[51] The Crown set out the issues in its Notice of Appeal and refined them in its factum. They can be encapsulated as follows:

1) Did the judge err in law when applying the principle of totality, including by describing the 30 days for each offence to be served consecutively as "crushing" and by providing insufficient reasons?
2) Did the judge impose a manifestly inadequate sentence because of how she dealt with the aggravating factor of the luring conduct pursuant to s. 725 of the *Criminal Code* and because she failed to adequately emphasize denunciation and deterrence?

[52] In my analysis I will first address an additional issue: whether the Crown can adopt a different analytical approach to Mr. Cromwell’s sentence on appeal than it took at sentencing.

Standard of Review

[53] Sentencing decisions are accorded a high degree of deference in appellate review. Appellate intervention is warranted if (1) the sentencing judge has committed an error in principle that impacted the sentence or, (2) the sentence is manifestly unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor" (*R. v. Friesen*, 2020 SCC 9, at para. 26; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, at para. 34).

[54] If appellate review determines that a consequential error in principle has been made, or that a sentence is manifestly unfit, then the court performs its own sentencing analysis to determine a fit sentence (*R. v. Lacasse*, 2015 SCC 64, at para. 43). As *Friesen* directs, in conducting the fresh sentencing analysis,

> ...the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle...
>
> (at para. 28)

[55] A variety of terms have been used to describe a sentence that is manifestly unfit: "demonstrably unfit"; "clearly unreasonable"; "clearly or manifestly" excessive or inadequate; or representing a "substantial and marked departure" from the cardinal principle of proportionality (*Lacasse*, at para. 52, citing Laskin, J.A. in *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.)).

[56] As *Lacasse* explains, the focus of an inquiry into whether a sentence is manifestly unfit is on the principles and objectives of sentencing. The gravity of the offence, the offender's degree of culpability, and parity must be reconciled in the crafting of a fit sentence (*Lacasse*, at para. 53).

[57] Appellate review in this case is to be confined to an examination of the judge's sentencing analysis for material errors and the question of whether the sentence fails to hold Mr. Cromwell sufficiently accountable for the serious offences he committed. As the judge observed, there is little assistance to be found in existing case law on s. 145(3) breaches.

Analysis

Can the Crown Adopt a Different Approach on Appeal to Sentencing Mr. Cromwell?

[58] The Crown says it is not bound by the approach Crown counsel took at sentencing. It relies on *Regina v. Cusack* (1978), 41 C.C.C. (2d) 289, a decision of the Nova Scotia Supreme Court, Appeal Division, which allowed a Crown appeal and substituted a period of incarceration for a non-custodial sentence that had been advocated for by the Crown at sentencing. Cusack argued the Crown "should not be permitted to change its position upon appeal and should be bound by the representations made to the original Court by the Crown prosecutor at the time sentence was imposed" (at p. 292).

[59] The Court did not agree, holding that:

> It is sometimes very helpful for a trial judge to have the opinion of Crown counsel as to quantum prior to imposing sentence. The trial judge, of course, is not bound by such opinion and it is, if given, but one factor to be considered in determining the appropriate sentence. I reiterate, and strongly emphasize, that the trial judge is in no way bound by the representations of Crown counsel as to the quantum of sentence, nor should the Crown in its appellate capacity always be bound by the view of its counsel at the trial. In my opinion, an appellate court must be free to consider the representations made by the Crown as one factor only in determining the fitness of sentence except in plea bargaining situations, and even there in exceptional circumstances…the appeal court may find it necessary to intervene (at p. 298) [emphasis added].

[60] *Cusack* involved the sentencing of an RCMP officer for theft from a motorist he had pulled over for a traffic violation. The sentencing court imposed a sentence of a day in jail served by Cusack's attendance in court and a period of probation for 24 months. The Crown had not sought incarceration, citing Cusack's dismissal from the force as punishment enough, and suggested a suspended sentence.

[61] The Appeal Division said "substantial punishment" was required for Cusack, given the "paramount consideration" of protection of the public and the need for general deterrence in cases of breach of trust (at p. 293).

[62] *Cusack* is not comparable to Mr. Cromwell's case. Crown counsel in Mr. Cromwell's case did not just suggest a particular sentence was appropriate: he

advocated for a thoroughgoing *approach* not limited only to quantum, that was intended to thread the sentencing needle for the judge. It was a considered and deliberate approach. Repudiating it on appeal is simply unfair. It is unfair to the sentencing judge who was persuaded to adopt it and is now being criticized for having done so. It is unfair to allow the Crown a fresh run at Mr. Cromwell's sentencing after its first effort produced what it says is an unsatisfactory result.

[63] I fail to see how the judge can be said to have erred when she exercised her discretion and adopted the approach urged upon her by the Crown, in the process rejecting various arguments made by Mr. Cromwell.

[64] It is of no comfort that the term of imprisonment being sought at appeal is the same – 18 months. The judge, using her discretion, determined that 18 months was not an appropriate sentence for Mr. Cromwell, a youthful, first offender with promising rehabilitative prospects. The Crown now wants another try at getting an 18-month sentence for him, using its re-tooled approach as the foundation for saying the judge's analysis was fatally flawed.

[65] The Crown is seeking increased sentences for individual breach charges. It relies on a new and more sophisticated analysis to undergird its claims of error. It has gone beyond merely asking this Court to re-sentence Mr. Cromwell on the basis that his sentence is manifestly unfit.

[66] The Crown is offering its new approach and saying that because this was not the approach used by the judge, she fell into error. The approach could have been argued before her. It was not. The sentencing Crown chose the approach to advance and urged the judge to follow it. As I have described, she largely did so.

[67] The Crown did not ask the judge to impose heavier sentences for the coercion calls. Nor did the Crown ask the judge to impose a heavier sentence for the call that amounted to a luring call. The judge followed the approach advocated by the sentencing Crown that, pursuant to s. 725 of the *Criminal Code*, the luring call was used to demonstrate Cromwell's bad character, an aggravating factor. The judge was asked to sentence by fixing the same sentence for each charge, which is what she did.

[68] This Court should be very reluctant to entertain a change of Crown position such as has occurred in this appeal. Appellate reticence was expressed in *R. v. Marks*, [1994] N.J. 241, by the Newfoundland and Labrador Court of Appeal:

> [31] There is no rule or principle which precludes the Court from considering an appeal in which the Crown takes a position different from that taken by Crown counsel at the trial level and this is so whether or not there has been a joint submission as to sentence. However, a court will only interfere with such a sentence in very exceptional circumstances and where not to do so would result in an injustice. In *Attorney General of Canada v. Roy* (1972), C.R.N.S. Vol. 18, 89, Hugessen, J. said at p. 93:
>
> > The Crown, like any other litigant, ought not to be heard to repudiate before an appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons. Such reasons might be where the sentence was an illegal one, or where the Crown can demonstrate that its counsel had in some way been misled, or finally, where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence.

[69] This is not a case of an illegal sentence, or where there is an assertion the sentencing Crown was misled. Nor do I find that Mr. Cromwell's offences and the sentence he received for them outweigh the public interest in consistency in the Crown's positions at sentencing and on appeal. There are no "very exceptional circumstances" that would justify this Court finding the judge erred in her approach to Mr. Cromwell's sentence because she did not calculate it according to the analysis the Crown now says is appropriate.

[70] As for there being no probation order, the judge cannot be faulted for imposing only what the Crown apparently regarded as necessary or appropriate – a sentence of incarceration.

[71] At the sentencing hearing, the Crown took an approach plainly intended to guide the judge through what the Crown viewed then as the proper analysis. I find the Crown cannot now say the sentencing judge was in error for having followed it. Her decision to closely follow what the Crown recommended as the appropriate analysis, including not differentiating amongst the breach charges, is entitled to deference.

[72] Setting aside the totality principle issue, which I will discuss separately, I am satisfied the judge did not err in her approach to Mr. Cromwell's sentence. Deference is owed to how she weighed the mitigating and aggravating factors, dealt with the issue of concurrent or consecutive sentences, and reached her conclusion that each breach should attract a 30-day sentence.

The Judge's Reference to a "Crushing" Sentence, Sufficiency of Reasons, and Her Application of s. 725(1)(c) of the Criminal Code

[73] The Crown argues on appeal that the judge erred by: using the term "crushing" to describe the 1680 day sentence she deemed appropriate prior to the application of the totality principle; inadequately explaining her reasons for reducing through the operation of the totality principle Mr. Cromwell's sentence from 1680 days to 168 days; and incorrectly applying s. 725(1)(c) of the *Criminal Code*.

[74] The judge used the term "crushing" to describe the impact on Mr. Cromwell of the sentence she calculated before the application of the totality principle. I find nothing turns on this usage. It appears only once in the judge's decision and in the context of her finding a 4.6-year sentence far exceeded Mr. Cromwell's "overall culpability" (para. 76). The language she used immediately upon determining Mr. Cromwell's global sentence was a direct recital of the language from the *Criminal Code*, that the consecutive sentences would be "unduly long and harsh" (para. 73). The judge went on to make her totality calculation which produced a sentence she found better recognized Mr. Cromwell's youth, his status as a first offender and his strong rehabilitative prospects.

[75] The Crown argues the judge fell into error by failing to explain the basis for the ten-fold reduction of Mr. Cromwell's sentence, 3 days' per breach charge from 30 days' each. However, the judge did explain her reasons; they were as I have just indicated. Whether the reduction she decided upon should be upheld is the final issue I will address.

[76] The sentencing Crown relied on s. 725 and its application to the April 30 luring call to demonstrate Mr. Cromwell's bad character, which the judge was asked to treat, and did treat as an aggravating factor. At no time in his written submissions or at the sentencing hearing did he say this should lead to a more significant punishment for a specific count in the Indictment – the April 30 breach charge – as compared to the other breach charges.

[77] The Crown now says the judge should have specifically treated the luring evidence as aggravating in relation to the breach count for April 30, increasing the sentence for that particular charge to 180 days. It is the Crown's submission the judge's treatment of the uncharged luring offence as a generalized aggravating circumstance was an error.

[78] I am not persuaded the judge was wrong in how she used the evidence of luring in sentencing Mr. Cromwell. I say this for several reasons.

[79] Mr. Cromwell was not being sentenced for luring. Increasing his sentence for the April 30 breach charge risks effectively doing so. Indeed, the submissions by the Crown in its factum suggest a relationship between the minimum sentence for child luring and the sentence the Crown is now saying should have been imposed on Mr. Cromwell for the April 30 breach.

[80] In paragraph 66 of its factum, the Crown says: "Child luring is an offence in the *Criminal Code* found in section 172.1. The minimum sentence available for one instance of child luring is 6 months in jail, when proceeded upon summarily, 1 year, when proceeded upon by indictment." The Crown continues in paragraph 68: "The Appellant acknowledges that the Respondent was not being sentenced for child luring at his sentencing hearing…However, the Sentencing Judge was required to impose a sentence that would reflect the gravity of the offences before the Court…"

[81] The judge's application of the evidence of luring as a generalized aggravating factor followed the approach the sentencing Crown had asked her to adopt. It was fair to Mr. Cromwell as it did not have the effect of sentencing Mr. Cromwell for an offence the Crown had not chosen to charge.

[82] There is no specific direction in *Larche* that precludes what the judge did with the luring call in sentencing Mr. Cromwell. *Larche* involved an appeal from a sentence on two charges related to drug trafficking and committing drug-related offences under the direction of a criminal organization. The Supreme Court of Canada agreed the sentencing judge had been entitled to apply s. 725(1)(c). The discussion in *Larche* is focused on the particular facts of the case, which are not comparable to Mr. Cromwell's. The case provides no explicit guidance on how to apply the aggravating nature of the facts of the uncharged offence. There is no examination of how the application of s. 725(1)(c) is to operate where there are multiple convictions, as in Mr. Cromwell's case.

[83] Although in *R. v. Angelillo,* 2006 SCC 55, released concurrently with *Larche,* the Supreme Court of Canada suggested that s. 725(1)(c) should be applied to a specific charge, I am not satisfied it was an error of law for the judge to have undertaken a generalized approach.

[84] In *Angelillo,* Justice Charron stated that:

> 32 …the court must draw a distinction between considering facts establishing the commission of an uncharged offence for the purpose of punishing the accused *for that other offence,* and considering them to establish the offender's character and reputation or risk of re-offending for the purpose of determining the appropriate sentence for *the offence of which he or she has been convicted*…(emphasis in the original)

[85] I refer to the above passage for the purpose of noting how Justice Charron viewed the application of the uncharged offence – for the purpose of determining the appropriate sentence for the offence that is the subject of the sentencing. Although in disagreement on an issue not relevant to this appeal, in *Angelillo*, Justice Charron and Justice Fish both viewed the evidence of uncharged offences as having an aggravating effect on sentence (*Angelillo*, at paras. 61-63, per Fish, J.).

[86] Mr. Cromwell's character was broadly relevant to the judge's determination of what would constitute an appropriate sentence. In *Angelillo*, Justice Charron observed:

> 22 The principles of sentencing are now codified in ss. 718 to 718.2 *Cr. C.* These provisions confirm that sentencing is an individualized process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender (see *Gladue*; *Proulx*, at para. 82). Thus, the objectives of sentencing cannot be fully achieved unless the information needed to assess the circumstances, character and reputation of the accused is before the court. The court must therefore consider facts extrinsic to the offence, and the proof of those facts often requires the admission of additional evidence.

[87] At Mr. Cromwell's sentencing, the judge correctly assessed that s. 725(1)(c) applied and took the luring call into account as an aggravating factor in the overall sentence. I find she did not commit error by doing so. It may be that in most sentencings, the aggravating factor of the uncharged offence should be applied to a specific conviction. However, I am unable to conclude the judge should have done so in this case. There is no clear law to support such a conclusion.

[88] Finally, as I have already discussed, the Crown chose a particular approach to Mr. Cromwell's sentencing. The generalized application of the uncharged luring offence as an aggravating factor was recommended to, and adopted by, the sentencing judge. I have not been persuaded the Crown should now be able to say this was an error of law.

The Judge's Application of the Totality Principle

[89] The judge's totality calculation led her to reduce the sentences for the breach charges from 30 days' imprisonment to 3 days. Is such a significant reduction entitled to deference?

[90] The judge used the correct methodology for applying the totality principle as set out by this Court in *R. v. Adams*, 2010 NSCA 42. First she fixed a sentence for each offence. She then considered whether the sentences should be consecutive or concurrent, and determined they should be consecutive. Her reasoning, which I set out earlier in paragraph 39, is entitled to deference. Finally, she took a "last look", decided the aggregate sentence of 1680 days or 4.6 years was disproportionate, and used her discretion to reduce it.

[91] The Crown says the judge's overly generous application of the totality principle resulted in a manifestly unfit sentence.

Did the Judge Impose a Manifestly Inadequate Sentence?

[92] As I indicated earlier, the sentencing Crown sought 90-days imprisonment per breach, served consecutively, for an off-the-charts global sentence of nearly 14 years. The Crown reached its 18-month proposed sentence by applying the totality principle to reduce the sentence for each breach to 10 days. The judge, having assessed the aggravating and mitigating factors, and accepted there is an overrepresentation of African Canadians in custody as a consequence of systemic racism, clearly viewed 18 months as too severe a sentence for Mr. Cromwell.

[93] I am satisfied that the judge's calculation of 30-day sentences for each breach charge is entitled to deference. This quantum for a s.145(3) breach conviction is within the range. A totality assessment naturally followed to reduce the global sentence of 4.6 years for this youthful first offender with good rehabilitative prospects. The judge's determination that a 4.6-year sentence was unduly long and harsh does not warrant appellate interference.

[94] The judge accepted the Crown's argument for consecutive sentencing. It was appropriate for her to apply the totality principle, as the Crown had suggested. It was reasonable for her to discount the charges uniformly in keeping with the approach she had adopted. She had the example of the totality calculation made by the Crown, which proposed a reduction of the sentence for each breach from 90 days to 10.

[95] I find the judge committed no error in giving effect to Mr. Cromwell's youth, his status as a first offender who had therefore never served a sentence before, let alone a sentence of incarceration, and his bright prospects for rehabilitation. Her emphasis on these factors was reasonable given the facts, and entitled to deference. Notwithstanding these factors, the judge concluded that Mr. Cromwell's significant moral blameworthiness required a sentence of incarceration. She was entitled to then decide that the principle of restraint should be an influential factor in moderating the length of this first sentence of imprisonment.

[96] Sentencing is not formulaic. It is nuanced, highly individualized and fact-driven. A sentence is not manifestly unfit simply because it was determined by application of a significant totality discount. However, in this case, the 168-day sentence imposed on Mr. Cromwell was manifestly unfit as it constituted a marked departure from the cardinal principle of proportionality. It was disproportionate to the gravity of his offending and the degree of his moral responsibility. Despite the judge's careful, well-informed analysis, she cut too deeply into Mr. Cromwell's global sentence. A longer sentence was called for.

[97] We have not been provided with, or found, any cases in which the application of the totality principle produced such a significant sentence discount. The problem with such a reduction is that it undermined the penological objectives of denunciation and deterrence. The penal consequences for Mr. Cromwell were effectively stripped away.

[98] Mr. Cromwell repeatedly breached a court order intended to protect his alleged victim and safeguard the integrity of her evidence. A number of the calls he made to HM were for the express purpose of defeating the case against him. He placed considerable and relentless pressure on HM in the hopes of cajoling or coercing her into recanting. He urged her to contact the Crown prosecutor and say the allegations she had made were lies. Such conduct constitutes a calculated attack on the administration of justice. It must be more sternly repudiated than it was.

[99] I find that a term of incarceration of 364 days (12 months), that is, 6.5 days for each of the 56 breach convictions is a sentence that better reflects the seriousness of Mr. Cromwell's offences and the deliberateness with which he committed them. Mr. Cromwell should receive credit for the 168 days he has already served by virtue of the application of enhanced remand time.

[100] The balance of the sentence – 196 days – is concurrent to the penitentiary sentence Mr. Cromwell received in May 2020, referred to in paragraph 8. My colleague, Justice Scanlan, says the 196 days should be served consecutively to Mr. Cromwell's May sentence. He refers to the relevant provision, s. 718.3(4) of the *Criminal Code*, that allows for a sentence being imposed to be served consecutively "to a sentence of imprisonment to which the accused is subject at the time of sentencing". He says we have the authority to require Mr. Cromwell to serve the 196 days consecutive to his current penitentiary sentence. This Court in *R. v. Johnson*, 1999 NSCA 42, concluded it had that power but chose not to exercise it. The circumstances in *Johnson* were not the same as Mr. Cromwell's.

[101] The Crown and Mr. Cromwell agreed that a sentence varied on appeal commences on the date of the original sentence (s. 687(1)(a), *Criminal Code*). Here that date was January 9, 2020. At that time, Mr. Cromwell was not subject to a sentence of imprisonment. This raises the question of whether, under s. 718.3(4), the 196 days could be served consecutively to the sentence he received in May 2020. Mr. Cromwell says the fact he was not under a sentence of imprisonment in January 2020 is fatal to the argument that any increased sentence we impose can be consecutive to the prison term he is serving now.

[102] In the Crown's submission, the appeal of Mr. Cromwell's sentencing opens the door to s. 718.3(4) being applied in his case. The appeal means Mr. Cromwell was subject to a sentence of imprisonment at the time of his May 2020 sentencing because his sentencing on the breach charges had not yet concluded. The "time of sentencing" is extended by the appeal. In submissions on the concurrent/consecutive issue following the appeal hearing, the Crown argued this permits the 196 days to be made consecutive to Mr. Cromwell's current penitentiary sentence.

[103] However, these post-appeal submissions were inconsistent with the Crown's earlier explicit acceptance of concurrency, stated in its factum:

> [112] The Appellant submits, given the jurisprudence on re-incarcerating offenders post-appeal, that should the Court grant this Appeal, the 18 month jail sentence (minus time served) and 3-year probation order proposed, could be served concurrently to the penitentiary sentence the Respondent is now serving.

[104] The concurrent/consecutive issue raises interesting considerations. That said, the Crown having endorsed concurrency originally, I prefer to proceed on this basis.

[105] The outcome of this appeal results in a reduction for totality of 30 days to 6.5 days per offence rather than the 3 days imposed by the judge. I have found no authority that adopts a totality discount of this magnitude. Nonetheless, in the circumstances of this case, the reduction to 6.5 days per offence is appropriate. I say this for the following reasons. The application of totality is not primarily an arithmetic exercise. Rather, it derives from principles and objectives of sentencing that are fair in the circumstances, and from which the arithmetic just follows. Here, the 56 offences comprised Mr. Cromwell's conduct in a series of communications. The judge determined that the 56 sentences would be served consecutively, a ruling this Court has not disturbed. Nonetheless, there were significant aspects of continuity and repetition in Mr. Cromwell's offending communications. That degree of continuity and repetition does not appear in the other authorities cited to this Court. Taking these unique facts into account in the application of totality, tailors the sentence to Mr. Cromwell's circumstances and degree of culpability. This serves the objectives of sentencing.

Disposition

[106] I would grant leave to appeal and allow the appeal against Mr. Cromwell's sentence to the extent of substituting for his original sentence of 168 days, a sentence of 364 days. This sentence commences on the date of Mr. Cromwell's original sentence – January 9, 2020. As noted, the additional 196 days is concurrent to the penitentiary sentence Mr. Cromwell received in May 2020.

Derrick, J.A.

Concurred in:

Fichaud, J.A.

Dissenting reasons for judgment (Scanlan, J.A.):

Introduction

[107] The panel is unanimous in holding that the sentence as imposed by the sentencing judge is manifestly unfit. The judge's application of the totality

principle simply cut too deep, resulting in a sentence that undermined the penological objectives of denunciation and deterrence, effectively stripping away the consequences for the respondent. With the greatest respect to my colleagues, I find a degree of incongruence in the fact that while we all agree the original sentence was manifestly unfit due to the lack of sufficient deterrence and denunciation, the majority would impose a concurrent sentence that does not have any additional penological consequence for the respondent. I am satisfied that without the sentence being made consecutive to other sentences now being served by the respondent, the sentence as imposed by the majority is as manifestly unfit now as it was before. A concurrent sentence provides no additional deterrence nor does it adequately express denunciation.

[108] There was a time when a court could not impose a sentence consecutive to a sentence that did not exist at the time of the sentence on appeal. I am satisfied the applicable law has changed, giving courts authority to impose a consecutive sentence in circumstances such as now before this Court. With the greatest respect to my colleague, I am satisfied that only a consecutive sentence will have the appropriate deterrence and denunciation effect which the Court unanimously agree was missing in the initial sentencing.

Background

[109] There is a lot about this case that is contextual and for that reason, at the risk of repetition, I set out and somewhat expand upon the summary of facts as referred to in my colleague's reasons.

[110] Mr. Cromwell pleaded guilty to 56 counts of breaching no-contact orders. The Crown sought an 18-month sentence. Defence asked for a sentence of 60 days. The only agreement on sentence was that Mr. Cromwell should receive an enhanced remand credit of 330 days – 1.5 days for each day he had spent in pre-sentence custody between the time of his arrest on the breach charges (June 4, 2019) and his sentencing (January 9, 2020). The Crown suggested the court could get to 18 months by assessing a sentence of 90 days for each offence then, applying the principle of totality, impose a sentence of 18 months.

[111] Justice Darlene Jamieson assessed 30 days' custody for each of the 56 counts, to be served consecutively (reported 2020 NSSC 14). This would have amounted to 1680 days or approximately 4.6 years. Applying a last look totality analysis, she reduced the sentences to three days per count to be served consecutively for a total of 168 days. She found that with the application of remand

credits, Mr. Cromwell's sentence had been served. The appellant says that sentence was manifestly unfit. The appellant asks that the original sentence be set aside and a sentence of 18 months plus three years' probation be imposed.

[112] The respondent argues that the sentence as imposed is appropriate and that any additional sentence should be served concurrent with a sentence imposed on May 15, 2020.

[113] I accept that one of the routes available to the sentencing judge was to determine an appropriate sentence, then apply the principle of totality, and reduce the sentence on each offence. She did that and determined an appropriate sentence was 30 days per offence. How does the discount of ninety percent compare to other cases? As noted by my colleague, many of the sentencings for breaches are done in provincial courts and the cases are not reported. No one involved in this appeal could find any reported cases that gave such a high discount based on the principle of totality.

[114] The judge also considered the principle of parity, commenting on the cases referred to by counsel. Again, there were no appropriate comparators to guide the sentencing judge. That, perhaps, makes the disposition of this appeal more important. In the absence of similar cases, it is important that a fit and proper sentence be imposed for future reference by other courts when considering the issue of parity.

[115] My colleague has focused attention on the fact that the process the sentencing judge used was as suggested by the Crown at the sentencing hearing. At no point did the Crown suggest that the sentence be as imposed. As I will more fully explain below, I am satisfied that what the Crown did was to provide nothing more than a roadmap showing the sentencing judge one route by which she could arrive at an appropriate destination.

[116] Like most journeys, there were several possible routes the sentencing judge could have taken using that same map. At the end of the day, it was for her alone to arrive at, or close to, an appropriate destination. I am convinced that while she may have used the map and route provided by the Crown, she was so far from an appropriate destination that it warrants appellate intervention.

[117] In considering whether the sentence should be set aside, I am cognizant of the wide discretion of sentencing judges and the reluctance of appeal courts to interfere. My colleague has set out the standard of review and the law as it relates

to when an appeal court should intervene and set aside a sentence. I take no issue with her statement of the law in that regard.

[118] I am also cognizant of the fact that appeal courts must accept findings of fact or identification of aggravating or mitigating factors as made by sentencing judges, absent error in principle (see *Friesen*, para. 28) and absent palpable error.

[119] In the present case, some facts before the court were in the form of an agreed statement of facts, supplemented by recordings of conversations offered up by the Crown as evidence of the extent and nature of the respondent's breaches of the court order. Not all those conversations were detailed in Crown submissions or in the sentencing decision. I will expand on the nature and content from some of those phone calls, because they are relevant circumstances in framing the nature of the breaches.

[120] As noted by my colleague, the sentencing judge referenced defence counsel's suggestion that many calls were between two unsophisticated young people "trying to navigate a relationship". Young people navigating a relationship connotes to me a romantic relationship. The charges against the respondent suggested he was advertising the sale of a young girl's sexual services. There is no romance in a pimp marketing a young girl into prostitution. A no-contact order was put in place to protect that young girl and the integrity of the justice system.

[121] I am satisfied that when considering a breach of a no-contact order under s. 145 of the *Code*, it is important to consider the alleged crimes which gave rise to the order in the first place (the primary offences). The nature and circumstances of the breaches are relevant, as is the vulnerability of the alleged victim, and the risk to the justice system if conditions are breached. Although my colleague made brief reference to the facts giving rise to the original charge, I am satisfied that it is important to understand the seriousness of what it was the respondent was trying to avoid in terms of prosecution.

[122] I summarize in general terms just some of the offences that were included in the indictment charging the respondent:

- advertising an offer to provide sexual services for consideration (s. 486.4);
- receiving financial benefit (s. 286.2(2));

- procuring a person under the age of 18 to offer sexual services (s. 286.1(2)) and did recruit hold conceal or harbour her or exercise control over her (s. 286.3(2));
- transport, hold, conceal or control a person under the age of 18 for the purpose of exploiting her or facilitating her exploitation contrary to s. 279.011(1);
- received financial benefit knowing it was derived directly or indirectly from an offence under ss. 279.01(1) or 279.011(1);
- choked the victim to enable him to commit sexual assault (s. 246(a));
- committed sexual assault (s. 271);
- unlawful confinement (s. 279(2));
- threaten to cause bodily harm (s. 264.1(1)(a));
- use a weapon (a handgun or imitation thereof) in committing an assault (s. 267(a)); and,
- pointed a firearm at the victim s. 87 and used a firearm while uttering threats (s. 87(1)(a)).

[123] All of these charges referenced the same youthful victim identified in the no-contact order.

[124] In addition, there were a number of firearm offences related to a sawed-off shotgun, with the serial number removed, and a .22 caliber handgun.

[125] The seriousness of the primary offences frames the importance of the no-contact order and provides context to the seriousness of any breach of that order. The respondent was facing many serious charges and went to great lengths to avoid prosecution.

[126] This was not a case of young people navigating a romantic relationship. The charges suggest it was more akin to a predatory, parasitic relationship involving a pimp who marketed the sexual services of a young girl online over a period of many months. The charges suggested the accused was prepared to use force, threats, and a firearm against this young girl in the context of continuing or enforcing his terms and the continuation of that relationship.

[127] A significant number of the breaches (conversations) were aimed at undermining the justice system in an effort by the respondent to avoid prosecution of very serious charges. His efforts were focused on the very same youthful victim identified in the primary offences. Many of the recordings are suggestive of a continued grooming by the respondent of that same victim. She was still a youthful person, under the age of 18. Some conversations included promises of a flashy new car, exotic vacations – the "good life", so to speak.

[128] The breaches of the no-contact order were planned, deliberate, and continued for an extended period, but for a brief interruption once the respondent became aware that the police had discovered his earlier breaches. The respondent's efforts to get the witness to change her evidence ranged from general discussions to begging, pleading, demanding and threatening. The calls started two months after the respondent was incarcerated and were almost daily, sometimes several times per day. When the victim did not answer, subsequent calls were often abusive. At one point, the respondent told the young victim, "I should jump through the fucking phone and get you". He made 170 calls to the witness over 56 days.

[129] The issue for this Court boils down to whether the sentence as imposed was manifestly unfit. Like my colleague, I agree that it was manifestly unfit.

[130] Once this Court finds that a sentence was manifestly unfit it is for this Court to impose an appropriate sentence. My colleague would impose a sentence of 6.5 days per breach. I am satisfied 6.5 days per offence is appropriate, but at the low end in this case. Ten days per offence would not be unreasonable either. For the reasons expressed by my colleague, I would not add any probation to that sentence.

[131] I want to explain why deterrence and denunciation are so important in this case, and why, with the greatest respect to my colleague, I feel the penological consequences of the sentence in this case must be real for this offender so that he and others realize the seriousness of breeching this type of no-contact order. The respondent faced 56 counts of failing, without lawful excuse, to comply with a no-contact order, contrary to s. 145(3) of the *Criminal Code*. The court directed that, pursuant to s. 515(12), Mr. Cromwell was not to communicate directly or indirectly with a named individual. The no-contact order had its origin in the primary charges as set out above and were related to allegations of advertising for sale the sexual services of a 17-year-old girl. The age of a victim is a relevant consideration when sentencing on the primary offences. Section 718.01

specifically refers to persons under the age of 18, as does s. 718.2 (a)(ii.1). Section 718.04 references vulnerable persons.

[132] Section 718.2 refers to intimate partners. If they were intimate partners then the abuse in the primary offences would trigger s. 718.2.

[133] All of those sections I refer to above suggest the primary charges were serious. I refer to those sections not because they are the offence that the respondent is dealing with on this appeal but because the seriousness of the primary offences is relevant to sentencing on s. 145 charges. Mr. Cromwell is being sentenced here for breach of a no-contact order.

[134] I agree with my colleague that in applying the principle of totality the sentencing judge simply "cut too deep". I am of the view, as is my colleague, that the sentencing judge's application of the totality principle warrants appellate intervention because the sentence as imposed was manifestly unfit.

[135] In determining an appropriate disposition, I have already mentioned some of the aggravating factors related to the youthfulness of the victim and the several references in s. 718 sections.

[136] Like my colleague, I also note the aggravating fact of Mr. Cromwell having used some of the calls to urge the witness to contact the Crown Prosecutor to say she had lied in her original statements to police. He was asking her to change her evidence. The respondent went further than urging her to tell the police that she had lied. He explained to her that because she had given a sworn statement to the police, she had to tell the Crown she lied, and then go to court to explain how and why she lied. He explained the legal consequences for her recanting in court, suggesting she would get nothing more than a slap on the wrist.

[137] Mr. Cromwell stopped calling for a brief period once he learned the police knew about the calls and had recordings of them. He resumed calling using a different phone number.

[138] This was more than an accused who defies a court order and continues to contact a spouse, acquaintance, or witness with no nefarious intent. A repeated theme in the phone calls was to have the witness change her story so Mr. Cromwell could avoid prosecution or conviction.

[139] Judges frequently witness failed prosecutions where witnesses/victims recant. False recantations have a devastating effect on the criminal justice system. The entire justice system is predicated on a full and fair presentation of evidence to allow the determination of guilt or innocence based on proven facts. If a recantation is the result of pressure or coercion by an accused on any witness it is a serious threat to the justice system. When it involves the victim it is even more serious.

[140] When the trial judge sentenced the respondent for the breach of the no-contact orders, there still had not been a determination of guilt or innocence on the primary charges. She did have the original charges with many very serious offences alleged. It was even more aggravating when the respondent was counselling the still youthful witness/victim, to assist him in undermining the judicial process. It is more serious still in that he made threats during some of those calls. Even the most innocuous conversations could not be described as those of a young couple finding their way in a romantic relationship. During the calls the respondent was talking of their future—new cars, exotic trips, accumulating $100,000 so they could be set up. These perks, he said, were predicated upon her not going to the police. The most innocuous calls should be properly characterized as a continuation of the grooming process that brought the victim to the point where she was when she went to the police in the first place.

[141] I add to that the fact the respondent was urging the victim to download an app and send pictures of her exposed “boobs” and “pussy” to him in jail. I agree with my colleague that the decision in *Larche* and s. 725(1) of the *Code* permit the use of that evidence as evidence as to the bad character of the respondent. It shows his willingness to continue to exploit this youthful victim. That negatively reflects on his character. The sentencing judge accepted the facts of the April 30 call constituted part of the circumstances of the offending conduct to which Mr. Cromwell had pleaded guilty. She found the content of the call could establish the basis for a separate charge of luring under s. 172.1 of the *Criminal Code*.

[142] The respondent was not charged with luring, but he was urging the victim to take pornographic pictures of herself and forward them to him in jail. It was a chargeable offence. This was all done in the context of a man who was facing serious charges of having advertised that same youthful person’s sexual services for sale.

[143] No-contact orders serve many purposes. From the victim's perspective, one would have to say that this order did little to protect her from ongoing abuse or threats. The appellant was in jail – supposedly to protect others from him – yet a youthful victim felt the brunt of the ineffectiveness of a court order. His behaviour resumed even after he knew the police were on to him. This speaks to his tenacity and determination. It also speaks to his total disregard for the law.

[144] The public and this victim should ask: if you can't protect youthful victims in cases like this, even when an accused is in jail, is anyone beyond the reach of those who ignore no-contact orders? I repeat, the calls were more than social calls. The number of calls show flagrant disregard for court orders. The content of some of the calls is shocking in the context of the serious charges the respondent was facing. These facts speak to the need for both general and specific deterrence in relation to these types of orders.

[145] The sentencing judge, as do I, noted the emphasis on restraint as a principle of sentencing for youthful first offenders, citing Justice Rosenberg's statement in *R. v. Priest*, [1996] O.J. No. 3369:

> [23] … a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence …

[146] The sentencing judge also considered Mr. Cromwell's African-Nova Scotian heritage, noting that, as a result of systemic racism, there is an overrepresentation of African Canadians behind bars in Canada. She did not have an Impact of Race and Culture Assessment before her – Mr. Cromwell had indicated through counsel he was content to proceed to sentencing on the basis of the Pre-Sentence Report alone.

[147] There are cases that discuss race considerations and serious offences. See, for example, *R. v. Borde* (2003), 172 C.C.C. (3d) 225, where the Ontario Court of Appeal referenced *R. v. Gladue*, [1999] 1 S.C.R. 688, and s. 718.2(e) and determined even though that *Code* provision did not specifically refer to African Canadians, the principles could apply:

> [35] This appellant committed a crime of great violence and used a loaded handgun on two separate occasions. The *Gladue* approach would not lead to any different sentence for these violent and serious offences. This does not mean that the background factors as revealed in the pre-sentence report are irrelevant. To the contrary, they are very important, but they are important because, as was said by

> the court in para. 80 of *Gladue*, the sentencing must proceed on an individual (or case-by-case) basis. […]

[148] The issue of "serious" offences was referenced in *R. v. Ipeelee*, 2012 SCC 13 in which the Supreme Court of Canada was clear that s. 718.2(e) applies no matter how serious the offence. The Court noted the inappropriateness of using the term "serious" when sentencing:

> [86] […] The *Code* does not make a distinction between serious and non-serious crimes. […] Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'". (*Pelletier*, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. […]

[149] In *R. v. Rage*, 2018 ONCA 211, the Ontario Court of Appeal cites *Borde* favourably, indicating that the case remains good law:

> [12] The appellant argues that the trial judge erred by not considering the over representation of African-Canadians in the nation's prison system as a basis for ordering a conditional sentence. We note that this argument was not raised before the trial judge, so it is difficult to find fault in his failure to deal with it.
>
> [13] In any event, the comments of this court in *R. v. Borde* (2003), 2003 CanLII 4187 (ON CA), 63 O.R. (3d) 417 (C.A.) are apt. In that case Rosenberg J.A. found that, "the principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes" (para. 32).
>
> [14] We accept the Crown's submission that the flexible approach to sentencing described by Rosenberg J.A. is precisely what happened in this case. The trial judge noted that the sentencing range for possession of a substantial amount of cocaine for the purpose of trafficking was from five to eight years' imprisonment. He then went on to craft a sentence that was well below the range he identified and in so doing, adequately took into account the appellant's particular circumstances.

[150] The specific charges considered here are not at the level of violence that would substantially derogate from consideration of racial background of the respondent, in fact it is only the primary offences that spoke of substantial violence.

[151] I find the comments of The Honourable Judge Peter A. Ross, in *R. v. Ryan*, 2019 NSPC 35, most illustrative of where the law stands now in relation to the import of evidence of cultural background:

> [74] In *R. v. Gabriel*, [2017] N.S.J. No.125 both a Gladue report and a cultural assessment were considered. It was a far more serious offence than Mr. Ryan's but the commentary is none the less pertinent. Justice Campbell notes at para. 52 that the purpose of the cultural assessment and the Gladue Report was not to justify a discount with respect to an otherwise appropriate criminal sentence. At para. 90 he says:
>
> > The assessment does not provide a justification for a lighter sentence. Like a Gladue Report it might prompt consideration of restorative justice options where these are appropriate but it doesn't position the offender as a helpless victim of historical circumstances.
>
> [75] In *R. v. Elvira*, [2018] O.J. No. 6185 (ONSC) Justice Schreck states at para. 26:
>
> > Crown counsel submits that since Mr. Elvira's brother grew up in similar circumstances but became a successful businessperson and not a criminal, it follows that Mr. Elvira's circumstances growing up played no role in his criminality. With respect, this submission misunderstands the role of adverse personal circumstances in the sentencing calculus as well as the concept of causation. The fact that an individual may have encountered obstacles in his or her life, including the effects of systemic racism, is simply an exemplification of what is sometimes referred to as "sad life mitigation": *R. v. P.V.*, 2016 ONCJ 64, at paras. 37-100. It recognizes the fact that an offender's background may affect the degree of his or her moral culpability. However, it does not operate to excuse criminal conduct. Mr. Elvira chose to be a criminal. His brother did not. The issue is not whether Mr. Elvira is morally culpable, but, rather, the degree of that culpability. The fact that others in similar circumstances made different choices does not mean that those circumstances had no role to play in the choices that were made. Were it otherwise, the fact that most Indigenous Canadians do not commit crimes would mean that the principles in *Gladue* are irrelevant.
>
> [76] In *R. v. Jackson*, [2018] O.J. No. 2136 (ONSC) Justice Nakatsuru states at para. 71 et seq:
>
> > … Like Rosenberg J.A. in *R. v. Borde* […] Doherty J.A. […] pointed out the differences between Indigenous offenders and those of other marginalized communities. He held that Parliament had chosen to identify Indigenous persons as a group to whom the restraint principle in s. 718.2(e) applies with particular force given the historical mistreatment of

> and the cultural views of that group which made imprisonment ineffective in achieving the goals of sentencing. […]
>
> [72] At the same time, Doherty J.A. recognized the potential importance of such materials. What he found fault with was the lack of any evidentiary link between the social context provided by that material and the particular circumstances of the two offenders whose sentences had been significantly decreased by it. In the course of his reasoning, he confirmed what was earlier said in *Borde* that such evidence could play a significant role in the sentencing of an individual. […]

[152] Justice Nakatsuru further states in *R. v. Jackson*:

> [103] Sentencing is about judging a fellow human being. The more a sentencing judge truly knows about the offender, the more exact and proportionate the sentence can be. Sometimes that should go far beyond the personal background of the offender. Sometimes it should include a broad swath of relevant historical, social, and cultural knowledge. An IRCA gives the judge an opportunity to learn about how this relates to the offender. A sentence imposed based upon a complex and in-depth knowledge of the person before the court, as they are situated in the past and present reality of their lived experience, will look very different from a sentence imposed upon a cardboard cut-out of an "offender".
>
> [104] That said, the task of sentencing cannot be delegated to others like Mr. Wright. It does not affect the demand of the law that a person is held accountable for their crimes. I can only agree with Campbell J.'s thoughtful characterization in *Gabriel* of an IRCA or a cultural assessment at para. 56:
>
> > The Cultural Assessment is not a single simple answer to a complicated question. It does not suggest that Kale Gabriel was destined by his race or his circumstances to find himself here. Like the *Gladue* report it provides important context and raises as many questions as it answers. […] Like a *Gladue* report it might prompt the consideration of restorative justice options where those are appropriate. It doesn't position the offender as helpless victim of historical circumstances.

[153] Racial considerations in this case are at least to a degree counterbalanced by other factors which the *Code* says judges are required to take into account when sentencing. I refer to various sections of the *Criminal Code* which direct sentencing judges to consider the age of the victims. For the victim, in terms of impact on her and her vulnerability, the racial background of an accused will likely be of little import. The victim's youthfulness and nature of the incidents would offset the impact of any racial or cultural background considerations of the respondent in this sentencing. In addition, I ask: where is the evidence to suggest

how the respondent's cultural background explains or justifies what he did in this case in terms of attempting to interfere with the judicial process?

[154] Both the primary offences and the circumstances and nature of the respondent's breaches of the no-contact order loom large. The justice system was under direct attack by the respondent. He was using the alleged victim in the primary offences to achieve his goal. He knew she was youthful and vulnerable. Many crimes have a lasting impact on their victims. It is hard to imagine crimes that have a more lasting negative impact on the life of a young victim than what was alleged in the primary charges in this case. All of that speaks to the seriousness of the respondent attempting to interfere with the operation of the justice system intended to determine his guilt or innocence on those offences.

[155] I am cognizant of the fact that this is not a resentencing of an accused for the primary offences. This is a case of assessing the circumstances of the offender and the breaches, with the primary charges informing the sentencing.

[156] My colleague has outlined the aggravating and mitigating factors as determined by the sentencing judge. It is not necessary for me to repeat them. I take all the circumstances into account, emphasizing what I consider important considerations of the youth and vulnerability of the victim and the seriousness of the primary offences. While I could be convinced to impose a sentence of 18 months instead of the lesser amount as suggested by my colleague, I am satisfied the 12 months as suggested by my colleague is not unfit considering the respondent's relative youthfulness and the fact he is a first-time offender.

Consecutive versus concurrent sentences

[157] After the appeal hearing, the Court asked the parties to make submissions related to the issue of whether the Court could impose a sentence that was consecutive to the sentence on the primary offences, the sentencing date being May 2020. The respondent took the position that the sentence, if increased, should be served concurrent to the later imposed sentence. The appellant suggested that over the years courts have wrestled with the issue of whether a court could impose a sentence that was consecutive to a sentence that was not in place at the time of the original sentence. The appellant suggested that courts have clear authority to impose a sentence to be served consecutive to a later imposed sentence.

[158] I track the appellant's submissions in this regard. Forty-six years ago this Court embarked upon the same discussion in *R. v. Reddick* (1974), 9 N.S.R. (2d) 425 where then Chief Justice MacKeigan said:

> In my respectful disagreement with my brother, Mr. Justice Macdonald, I question whether s. 645(4) of the Criminal Code restricts consecutive sentences exclusively to the situations listed in that section. I also doubt if that section in any event restricts an appeal court in varying sentences under s. 614 "with the limits prescribed by law".
>
> [p. 426]

[159] In *R. v. Muise* (1975), 23 C.C.C. (2d) 440 Chief Justice MacKeigan said:

> […] *A so-called concurrent sentence does not sentence the convicted person to a term of any imprisonment at all since it does not require him to serve a single day of imprisonment;* a person cannot serve in jail the same day twice [...] A judge in imposing a concurrent sentence is therefore not carrying out his duty unless he can find in the Code or the general criminal law authority so to do. (*emphasis added)*
>
> [pp. 443-444]

[160] When the Chief Justice was speaking, s. 645(4) governed sentencing. The relevant *Code* provisions have been amended twice since then, now to become s. 718.3(4). Prior to the most recent amendment, then Chief Justice Lamer discussed the unfortunate wording of the *Code* saying in *R. v. Paul*, [1982] 1 S.C.R. 621, the provisions then in place did not permit a consecutive sentence to be imposed unless it is consecutive to a sentence imposed prior to the time of the original sentence:

> […] a sentence cannot be made consecutive to that imposed by another judge in another case unless that sentence had already been imposed by the other judge at the time of conviction in the case in which he is sentencing.
>
> [p. 664]

[161] Section 718.3(4) of the *Code* now provides:

> The Court that sentences an accused shall consider directing
>
> > (a) That the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing;

[162] I refer to my colleague's decision paragraph 100 where she notes in *R. v. Johnson*, 1999 NSCA 42, that this Court concluded that it had to power to impose a concurrent or consecutive sentence. This issue arose again in *R. v. Keats*, 2018 NSCA 16, where Justice Van den Eynden, writing for a panel that included Justices Farrar and Fichaud, again noted that section 718.3(4) authorizes the judge to impose a new sentence consecutive to one already being served, adding:

> 26. … Section 718.3(4) makes no mention of the relevancy of offence dates. Rather, under s. 718.3(4)(a), it is the date the sentence is imposed that is relevant – **not** the dates on which the underlying offences occurred. … [emphasis in original]

[163] The circumstances of the present case are as compelling as the *Keats* case, and in spite of any vacillating by the Crown, as in *Keats* the only way to make this a fit sentence is to have penal consequences for the respondent that were lacking in the original sentence.

[164] The focal point is no longer the time of conviction as it was in the predecessors to s. 718.3(4). I am satisfied this Court now has the authority to impose a sentence that is to be served consecutive to the sentence the respondent is now serving even though it was not a sentence that was in place at the time of the original sentence.

[165] There is nothing about this case that justifies a concurrent sentence, just as the offences themselves did not justify concurrency. These offences were separate in time and are based on a completely different factual matrix when compared to the primary offences.

[166] My colleague refers to the appellant brief paragraph 112 where the court talked of reincarcerating offenders. This case is distinct from cases where an accused has served a sentence and is released. Even without that distinction, the need for denunciation and deterrence cries out for a sentence of consequence in this case. The accused is imprisoned at this time, serving a sentence imposed in relation to the primary offences. If this Court does not order the sentences to be served consecutive to the sentence now being served there is nothing more than a notional correction of a sentence that was "manifestly unfit". Appeal courts should not be tinkering with sentences, making notional changes. The correction will be devoid of any penal consequences for the respondent. In addition, it will do little more than provide a roadmap for like-minded offenders in the future to continue to

commit the very offences for which this Court is now sentencing the respondent. This roadmap was highlighted by the appellant in its post-hearing brief:

> 16. Prior to the amendments to the *Criminal Code* in 1997, accused persons were taking advantage of a loophole in what was then section 645(4), and then section 717(4), by pleading guilty to various offences separately before bringing them together for a sentence. At the time of each separate conviction (guilty plea), that accused would not have been sentenced yet for the other offences. The accused, therefore, could not be sentenced to consecutive time for any of the offences that were grouped together and placed before the sentencing judge.

[167] That is exactly what Chief Justice Lamer complained of in *Paul* in relation to the earlier *Code* provisions. The *Code* amendments were intended to prevent that manipulation, and I am concerned that this Court would do anything that could be viewed as an end run around that amendment.

[168] To impose a concurrent sentence in the circumstances of this case is to make a notional correction to a manifestly unfit sentence. The sentence as imposed by the majority is devoid of any penal consequence for the respondent. With the greatest respect, it is as manifestly unfit as the original sentence for the same reasons. The error in the court below is simply being repeated. A concurrent sentence lacks deterrence and denunciation warranted by the offences and circumstances before us.

Disposition

[169] I would grant leave to appeal and allow the appeal against Mr. Cromwell's sentence. He should get 6.5 days per offence less the enhanced credit for the remand as agreed to. I would round the sentence to 12 months. The balance of his sentence, after deducting remand credit, should be served consecutive to any sentence he is currently serving, including any sentence on the primary offences.

Scanlan, J.A.