NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Marriott***, 2014 NSCA 28

Date: 20140325
Docket: CAC 352265
Registry: Halifax

Between:

Aaron Gregory Marriott

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Oland, Fichaud and Farrar, JJ.A.
Appeal Heard:	October 2 and 3, 2013, in Halifax, Nova Scotia
Held:	The fresh evidence motion is allowed, leave to appeal is granted, but the appeal is dismissed, per reasons for judgment of Oland, J.A.; Fichaud and Farrar, JJ.A.
Counsel:	Elizabeth D. Cooper, for the appellant Mark Scott, for the respondent Stacey Gerrard, for Kevin Burke, Q.C.

Reasons for judgment:

[1] In the early evening hours of November 18, 2008, gunshots rang out in the parking lot of the children's hospital in Halifax. Within a month, Aaron Marriott was arrested and charged with three attempted murders, one conspiracy to commit murder, and several weapons offences. He plead guilty to one attempted murder and, in accordance with a joint recommendation by the Crown and his trial counsel, was sentenced to 15 years imprisonment. He appeals his sentence and applies to introduce fresh evidence to support his appeal.

[2] The appellant submits that the sentencing judge, Justice Kevin Coady of the Supreme Court of Nova Scotia, erred because essential facts concerning the offence as supplied by the Crown were incomplete or wrong, so he did not receive due process. He also maintains that he did not have the requisite intent for attempted murder, suggests that certain particulars were overlooked, claims breaches of his *Charter* rights, and argues that his sentence was demonstrably unfit. He does not allege ineffective assistance of counsel.

[3] In *R. v. Marriott*, 2013 NSCA 12 ("*Marriott* #1"), this panel dealt with certain matters pertaining to this appeal. Fichaud J.A., for the court, determined that Mr. Marriott had impliedly waived his solicitor-client privilege with his former counsel, Kevin Burke, Q.C. to the limited extent as prescribed in that decision. He also held that the Crown's motion for dismissal of the appellant's grounds of appeal relating to alleged breaches of the *Charter* was premature. As I will explain later, that decision led to additional filings, including a fresh evidence motion, and cross-examination of certain affiants at the hearing of this appeal.

[4] For the reasons which follow, I would allow the fresh evidence motion, grant the leave to appeal, but dismiss the appeal.

Background:

[5] I begin by quoting from *Marriott* #1 which included a summary of the procedural history pertaining to the charge, the plea and joint recommendation, and the sentencing hearing:

> [4] Mr. Marriott was charged, on a multi-count information, with attempted murder of Jason Hallett. His co-accused were Jeremy LeBlanc, Matthew Murphy and Shaun Smith.
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> [5] The event occurred on the evening of November 18, 2008 outside the IWK Children's Hospital in Halifax. …
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> [6] Mr. Marriott elected a trial by judge and jury in the Supreme Court of Nova Scotia. He was represented by Mr. Kevin Burke, Q.C., an experienced criminal counsel. According to the comments by counsel to the trial judge, there had been an extensive and lengthy evaluation of evidence and negotiation between the Crown and Mr. Burke. Mr. Burke said he had "extensive discussions with my client, before an agreement was reached here". As a result, on the opening day of trial, April 26, 2011, Mr. Marriott entered a guilty plea to attempted murder under s. 239 of the *Criminal Code*. Justice Kevin Coady of the Supreme Court of Nova Scotia presided. The sentencing was adjourned to May 16, 2011, to enable the Crown and defence to place before the Court the basis for their joint recommendation on sentence. No pre-sentence report was requested.
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> [7] The guilty plea and joint position incorporated more than one file for which Mr. Marriott was subject to prosecution. The plea and recommendation were premised partly on the Crown's withdrawal of an eleven count indictment alleging, among other things, another attempted murder by Mr. Marriott on the same victim three months before the IWK event.
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> [8] The sentencing hearing proceeded on May 16, 2011, Justice Coady again presiding.
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> [9] At the sentencing hearing, the Crown's brief included a statement of facts … that both counsel informed the sentencing judge was not in dispute. The Crown and Mr. Marriott's counsel jointly recommended a forward sentence of fifteen years, meaning no reduction for remand custody from the fifteen years. Mr. Marriott's counsel informed the court that Mr. Marriott understood the implications, including segregation, of penitentiary time for his offence. Mr. Marriott attended during the sentencing hearing on May 16, 2011, addressed the Court after hearing the submissions by the Crown and his own counsel, said he took full responsibility, and said "I have to face the consequences and take my punishment".

[6] An elaboration of the facts leading to this appeal is necessary to provide the requisite context. On April 26, 2011 when Mr. Marriott elected to be tried by a judge and jury, Mr. Burke asked that the attempted murder charge be read and said that the appellant would enter a plea. The transcript sets out Mr. Marriott's plea of guilty and the judge's questions to him, including in regard to disclosure:

COURT CLERK:

AARON GREGORY MARRIOTT, you stand charged that on or about the 18th day of November, 2008, at or near Halifax, that you did attempt to murder Jason William Hallett while using a firearm, by discharging a firearm at Jason William Hallett, contrary to Section 239(a) of the **Criminal Code**."
How do you plead?

AARON MARRIOTT: Guilty.

THE COURT: Any comments on the remaining counts?

MS. SMITH: Yes. Again, My Lord, it would be the Crown's intention, if that plea is accepted, to withdraw the remaining counts on the indictment. We have, again, a request for an adjourned sentencing date. The date convenient to Mr. Burke and myself would be May 16th at 9:30 a.m., for two hours. And we will have a joint recommendation to make to the court at that time.

THE COURT: Thank you. All right. Mr. Marriott, you've indicated that ... you have indicated your willingness to plead guilty to count number 2, as I understand it?

AARON MARRIOTT: Yes, Your Honour.

THE COURT: All right. You understand ... And you've received disclosure; you understand what they're alleging you did?

AARON MARRIOTT: Yes.

THE COURT: All right. And can you assure me that no one is bringing any pressure to bear on you to plead this out?

AARON MARRIOTT: No, Your Honour.

THE COURT: And you understand that you are presumed innocent, as you stand here now, until I accept your plea, but you're giving it up and you're going to be guilty?

AARON MARRIOTT: Yes.

THE COURT: You understand that?

AARON MARRIOTT: Yeah.

THE COURT: And you understand that the joint recommendation that may, that your counsel and Ms. Smith have spoken about, that I'm not necessarily bound by that?

AARON MARRIOTT: Yes, I understand.

THE COURT: Okay. I'm prepared to accept his plea. … I'll put Mr. Marriott's sentencing over til May 16th at 9:30 a.m. …

[7] Ms. Smith advised that she would have the Indictments, which contained charges that would be withdrawn, brought before the court on May 16th. Mr. Burke confirmed that no pre-sentence report was sought.

[8] The transcript of the May 16, 2011 hearing included the Crown's and trial counsel's submissions on sentencing and their joint recommendation. The submissions recounted the event which led to the charge of attempted murder and some particulars about the appellant. The transcript reads in part:

MS. SMITH: And as I had indicated to the Court, and I believe it may have been indicated on the day that Mr. Marriott entered his plea, my friend and I have a joint recommendation before the court today's date.

THE COURT: All right.

...

SUBMISSION ON SENTENCING BY MS. SMITH

MS. SMITH: ...

The facts in relation to this matter are referred to at length in the brief filed by the Crown, and I will touch on them briefly. These matters are not in dispute as between my friend and myself.

The sequence of events that unfolded on November 18th of 2008 unfolded very rapidly, beginning with a call from the girlfriend of Jeremy LeBlanc, an associate of Mr. Marriott's, advising that one Jason Hallett could be located at the IWK Hospital in downtown Halifax.

Within half an hour of that call being received, Mr. Hallett was shot by Mr. Marriott in the front area of the hospital's parking outside of the entrance, these events having unfolded with that call and the result being that Mr. Marriott, along with others, traveled to the hospital via two separate vehicles. Once there, Mr. Hallett was located, quite by chance, as he had come out of the building, from visiting his infant child, to have a smoke and to obtain more cigarettes from a friend.

At the time that Mr. Hallett was shot by Mr. Marriott, Mr. Hallett was shot while seated in the passenger seat in the front of a Jeep Cherokee being operated by the person who had come to provide him with cigarettes. There was another individual who was in the back seat at that time. This shooting occurred at approximately 6:45 p.m. on a weekday evening. Mr. Hallett was shot at close range with a handgun. He was struck in the wrist, and this was despite the fact that witnesses would say anywhere from three to five shots were fired into the Cherokee. Certainly, on a forensic examination of the vehicle, the vehicle was hit with at least three distinct projectiles. The injury that Mr. Hallett suffered was superficial; it required some treatment by way of stitches at the Emergency, and Mr. Hallett was certainly releasable that day.

The motivation for this crime, as if there could ever be any good one, was simply that Mr. Hallett had switched allegiances from one rival crime group to another.

Mr. Marriott is 20 years of age. He comes before the court with 22 prior convictions, those convictions having been entered between 2004 and 2011. Essentially, the last seven years saw Mr. Marriott amass these 22 prior convictions. In 2004, when his criminal record began, he was a mere 13 years of age. All of his prior convictions, save for one, had been committed while he was a youth. The one that has been committed since he was an adult occurred while he was on remand in relation to this offence and related to ...

THE COURT: Did you say of the 22 prior convictions ...

MS. SMITH: Yes.

THE COURT: How many were as a youth?

MS. SMITH: 21.

THE COURT: 21 as a youth.

MS. SMITH: 21 of those. The one prior or the one conviction that occurred as an adult occurred since Mr. Marriott has been on remand for this offence and relates to a mischief offence that occurred in the correctional facility.

This record of Mr. Marriott's includes crimes of violence, weapons offences and drug trafficking.

We do not have the benefit of a pre-sentence report before the court. My friend and I have discussed this matter, and I'm sure Mr. Burke will have much to say about Mr. Marriott's personal circumstances. I can recall, certainly, from reading past pre-sentence reports in relation to Mr. Marriott, that he was said to come from a law-abiding family, to have had the benefit of a good upbringing, to

have had opportunities to have played hockey and engage in sports as a young person. Very clearly, this was a lifestyle that Mr. Marriott chose.

...

The recommendation that my friend and I have reached, on a very considered basis, Your Lordship, is for a sentence of 15 years' imprisonment. That would be on a go-forward basis, with no credit for the remand time that Mr. Marriott has served to date, which has been since his arrest some two and a half years ago, in December of 2008. Effectively, the recommendation that the Crown makes and which my friend has joined in has already taken into account the remand time that Mr. Hallett(sic) [from transcript] has served. This is a primary designated offence and, as such, we're asking that a DNA order be made. I have provided a copy to the clerk for the court. My friend has a copy. As well, there is a mandatory firearms order and, because of the previous order made against Mr. Marriott, that order should be for life.

...

SUBMISSION ON SENTENCING BY MR. BURKE

MR. BURKE: Thank you, Your Honour, My Lord. The facts that the Crown has outlined to the court, for the most part, I don't take issue with. The comments concerning Mr. Hallett, I think, deserves a little more elaboration than maybe what my learned friend has pointed out to the court.

Mr. Hallett was carrying a handgun at the time, carrying a handgun inside the Children's Hospital, a loaded handgun. It's very difficult to appreciate the emotional impact that this particular incident had on Mr. Hallett, given the fact that he has quite a history in terms of his participation in one criminal gang versus another, the fact that he was carrying a handgun into a public children's hospital on, I believe it's on the second floor, for no other purpose, I would respectfully suggest, than had he had to use the handgun, that the handgun would have been there for use. And so I point that out to the court, not in the sense that if any particular person is a victim of violence that, obviously, they're going to suffer some degree of trauma as a result, but given the fact that there are special circumstances as it relates to Jason Hallett that I think need to be taken into consideration, as well.

As my learned friend has pointed out, there have been extensive discussions in respect to this matter. The discussions not only focused on the IWK incident but also has focused on other matters that, as Your Lordship can see, are presently before this court and will be dealt with as part of the whole submission that's being made here this morning. The discussions as it relates to this joint recommendation commenced close to a year ago. They've been ongoing for some considerable period of time. I have had extensive discussions with the Crown, as

well, extensive discussions with my client, before an agreement was reached here. A number of factors have been carefully considered and, in particular, the strength of the Crown's case as it related to this particular incident and also as it relates to the other matters that are presently before the court. So the sentence that's being suggested here is not an undue lenient sentence, by any stretch of the imagination. It's a 15 year sentence, commencing today, that also recognizes that Mr. Marriott has been in custody since December of 2008, December 11th, 2008. So he's got 29 months in pre-trial custody. Now, obviously, that has to be reflected, and it is reflected, the fact that he is, essentially, being sentenced without any two-for-one credit being considered at all, that he's looking at 17 years and five months.

...

Now, of course, the difficulty that he's facing is that ... and Mr. Marriott knows that, as well as a lot of us, that he'll be sentenced and he'll be sent to Renous and, because of past associations, he will be dealt with accordingly. In other words, he will be segregated. He will be segregated with his past associates, which creates an almost insurmountable difficulty in trying to extract himself from a never-ending scenario. He will then be in the same situation that he would have been, say, growing up, when he was 13 or 14 or 15, in Spryfield, or the same thing in Burnside. There's no course corrections here. What, in essence, will happen is that there'll be a lot of associates that would be put on the same range as Mr. Marriott, from the officials' point of view, more for control than anything. No attempt at rehabilitation of any meaningful, in any meaningful way. It will be simply a matter of control. And consequently, he has to be looking at a sentence of 15 years that really nothing is changing in his environment. He's in the same environment that he moved out of in Spryfield into Burnside and on to Renous. The only possibility that he has is to, essentially, apply for a transfer, which everyone else is doing. And that even follows him wherever he goes, whether it's B.C. or Ontario or Alberta, that the association of being involved with a "gang" automatically characterizes him and where he's going to be placed in whatever institution.

So it's a very difficult future that a 20-year-old faces. Even if he has a sincere and honest desire to somehow change his life, if he recognizes that he has a level of intelligence that can allow him to change, he recognizes that the only person that is going to give him any assistance, any assistance whatsoever, is himself. And this is something he's learned in Burnside, that his contacts, his communications with, say, professors at Acadia may open a world to him, but you can see, without much further consideration, that that's a very, very small part of what his life is going to be like when he's sent to Renous.

He recognizes that unless something should come out of these efforts that he's making, in terms of trying to get a university degree, that he's looking at two situations: one, that he'll end up doing two-thirds of his time - he's 20 years old,

> he's ... he knows that - not one-third of his time, by virtue of his being associated, his being, I guess, pigeon-holed or characterized. So you're looking at 10 years, not five years, in terms of when he actually has a realistic possibility of being released. So he's, essentially, going to be from 20 to 30 years old at the time when he is applying.
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> ...
>
> Mr. Marriott ... What I'm, essentially, relating to the court today, Mr. Marriott has related to me, over a number of discussions that we've had over the past several years. These are views, these are feelings that he has expressed to me, that I'm passing along to the court. And it's a rather tragic situation that we are looking at today.
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> It is a joint recommendation, and Mr. Marriott is prepared, he understands what 15 years is all about and he's prepared to accept it and to deal with it. And the way he's going to try an (sic) deal with it is the way that I've explained it to the court today.
>
> Those are my comments.
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> **THE COURT:** Mr. Marriott, would you like to say anything?
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> **AARON MARRIOTT:** Do you think I could have a brief recess first? Is there any way ...

[9] After a recess of a full hour, Mr. Marriott addressed the judge and took sole responsibility for his actions. He even exonerated two of the others who had been charged. The transcript reads:

> **THE COURT:** ... All right. Mr. Marriott, did you wish to say something, sir?
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> **AARON MARRIOTT:** Yes, Your Honour. I've prepared a few things.
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> **THE COURT:** Well, you go ahead, sir.
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> **AARON MARRIOTT:** First of all, Your Honour, I would like to take this moment to address the court. I would like to apologize for what I did. I am very remorseful, and I definitely regret my actions on that night. I would also like to apologize to the public for what I did. What I did was unacceptable and I have no excuses for what happened, but what did happen should have never taken place in the location that it did, under any circumstances. I am sorry for what I did, but I deeply regret that it happened in such a public place.

> I would like to apologize to my family for everything that I've put them through. They also suffered the consequences of my actions. They also feel the punishment. So I am sorry for everything that I put them through. I not only messed up my own life but also theirs.
>
> I would also like to sincerely apologize to two people, in particular, Jeremy LeBlanc and Matthew Murphy, and also their families. I am sorry for dragging them into this mess. What I did was unpredictable and completely out of character for me. Jeremy LeBlanc and Matthew Murphy are completely innocent. They are both standing trial because of my actions and the decisions that I made. There is no way possible that they could have known what I was going to do that night. Unless they had psychic abilities, they didn't know what was about to happen. I didn't even know what I was going to do. I'm not sure exactly when I made the decision, but it was sometime between getting out of my vehicle and walking toward the victim. It was my fault for having a loaded handgun on me. There was no way that Jeremy or Matthew could have known I was carrying a gun on me. I am using this opportunity to let the courts know that two completely innocent men are facing charges because of my actions. And what I done has affected so many people - my family, them, their families, the victim, his family, all the people that were at the IWK that night when I did what I did. I'm responsible for what happened, and not them.
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> I can't explain the weight that I have been carrying with me during the last two and a half years that I have been incarcerated, knowing that my actions have affected as many people's lives as they did. I have no excuses for what I did. I definitely regret it. There's no way that I can undo it. And I know that all there is now is I have to face the consequences and take my punishment.
>
> **THE COURT:** Thank you, Mr. Marriott.
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> **AARON MARRIOTT:** Thank you for your time, Your Honour.

[10] The judge then accepted Mr. Marriott's re-election to judge alone for an 11-count Indictment. After the Crown advised that it would not be offering evidence on any count other than one attempted murder, the judge dismissed the remaining ten charges.

[11] At the beginning of their submissions on sentencing, both counsel referred to the facts as contained in the Crown's brief. The Crown told the judge that those facts quoted "are not in dispute as between my friend and myself". Similarly, Mr. Burke stated that "[t]he facts that the Crown has outlined to the court, for the most part, I don't take issue with". He did add that Mr. Hallett had a loaded handgun at

the time. No evidence was presented at the sentencing, and no pre-sentence report was prepared.

[12] The statement of facts in the Crown's sentencing brief recounted the events of November 18, 2008 and the arrests of Messrs. LeBlanc, Murphy, Smith and Marriott. According to the appellant, errors and omissions in this document led to the imposition of a demonstrably unfit sentence. Here is what the statement of facts said:

> **Part 1 – Facts**
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> 1. On November 18, 2008, Jeremy Leblanc (hereinafter "LEBLANC") and his associates, including Aaron Marriott (hereinafter "MARRIOTT") made a plan to kill Jason Hallett (hereinafter "HALLETT"). They were unaware that while they made this plan the police were listening.
>
> 2. Operation Intrude was a joint investigation by RCMP and Halifax Regional Police into *Criminal Code* and *C.D.S.A.* offences being committed by a targeted group of individuals who were subject to surveillance of different varieties, including phone intercepts. MARRIOTT, LEBLANC, and Shaun Smith (hereinafter "SMITH") were known to police to be members of a group working in the illicit drug trade and referring to themselves as the "Spryfield M.O.B."
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> 3. On the date in question, judicial authorization to intercept MARRIOTT, LEBLANC and SMITH's phone calls, and phone calls of other LEBLANC associates, was obtained by police. Consequently, the phone conversations that took place between and among LEBLANC, MARRIOTT, SMITH and Matthew Murphy (hereinafter "MURPHY") as the plan to kill HALLETT developed, were recorded.
>
> 4. On November 18, 2008, at approximately 6:09 pm, LEBLANC received a phone call from his then-girlfriend, Jennifer Hachey, who worked at the IWK Children's Hospital in Halifax. Hachey told LEBLANC that HALLETT was at the IWK hospital. LEBLANC told Hachey, "just do your job, okay?" (see Intercepts, Tab 1).
>
> 5. LEBLANC proceeded to communicate by phone with each of SMITH and MARRIOTT, informing them that HALLETT, a member of a rival gang, was at the IWK Hospital. LEBLANC was already proceeding to the IWK hospital in a vehicle with MURPHY. MARRIOTT and SMITH drove together to the IWK hospital in a Chevrolet Blazer that was missing its rear window, and that had clear plastic affixed in the place of the rear window with bright red tape. The Blazer's license plate was ENM 609.

6. MARRIOTT and SMITH stopped to meet with Dawn Anne Bremner at approximately 6:26 pm, before carrying on to the IWK hospital.

7. While proceeding to the IWK hospital, MARRIOTT phoned LEBLANC to clarify where Hachey worked, and LEBLANC confirmed to SMITH and MARRIOTT that HALLETT was located at the IWK hospital: "the same place we were lookin' before" (see Intercepts, Tab 9). During this phone conversation, LEBLANC directed MARRIOTT not to run right in to the hospital in order to carry out their plan, since Hachey was working there, and her employer "might fuck around with her later."

8. HALLETT was at the IWK hospital because his child had been born there a few days earlier, and the child was still admitted to the hospital.

9. LEBLANC and MURPHY arrived first together at the IWK hospital on the evening of November 18, 2008. From within their vehicle, they covertly observed HALLETT outside the hospital, and passed information about HALLETT's location to SMITH by phone. HALLETT had come down from visiting his child inside the hospital in order to smoke a cigarette outside of the hospital, and in order to obtain more cigarettes from a friend. HALLETT had a handgun in his possession at that time.

10. When LEBLANC indicated to SMITH over the phone that HALLETT might be leaving the hospital grounds, SMITH expressed to LEBLANC a desire to block HALLETT from leaving.

11. Subsequently, after it became evident that HALLETT was not leaving the hospital yet, LEBLANC and MURPHY, while on the phone with SMITH, drove beside HALLETT's exact position, and MURPHY told SMITH that HALLETT was "right there on the right." At this point, SMITH is heard saying, "gimme, gimme the gat" (see Intercepts, Tab 11).

12. Shortly afterward, in a subsequent phone call, LEBLANC and MURPHY told SMITH that HALLETT had jumped into a Cherokee (a Jeep sport utility vehicle).

13. In the final phone call before HALLETT was shot, LEBLANC and MURPHY confirmed the location of the Cherokee, "right in front," to SMITH and MARRIOTT (see Intercepts, Tab 13). SMITH then told MARRIOTT, "get out and blaze that Cherokee."

14. At approximately 6:45 pm, MARRIOTT then exited the Blazer, dressed all in white and wearing a hooded sweatshirt with the hood pulled close over his face, and proceeded to walk up to the Cherokee that HALLETT and two other passengers were sitting inside.

15. MARRIOTT fired several shots at close range from a handgun into the Cherokee in an attempt to kill HALLETT. Various eyewitnesses reported having heard anywhere between three and five shots. Forensic analysis revealed that the Cherokee had sustained damage from at least three different fired projectiles, and that the projectiles were most likely fired from a .375, .38, or 9 millimetre-calibre pistol or revolver.

16. MARRIOTT then turned and ran back to the Blazer. Once he was inside the Blazer, SMITH drove away proceeding Westbound in an Eastbound lane on University Avenue, and then Northbound on Robie Street. An eyewitness who was in a vehicle behind the Blazer on Robie Street called 911 to report the Blazer, as the eyewitness suspected that the driver was intoxicated on the basis of the Blazer's erratic and dangerous driving through traffic.

17. HALLETT was hit only once, in the wrist, by the shots that were fired at him. He received emergency medical treatment at the QEII hospital shortly after the shooting, and was discharged from that hospital the same night.

18. No one else was injured in the shooting, although the shooting caused a substantial disruption to the IWK hospital, which declared a "Code" and a form of lockdown in relation to the shooting, and to the witnesses who were all kept behind for hours and asked to provide statements to police investigators.

19. Multiple eyewitnesses who were present in very close proximity to the Cherokee at the time of the shooting, and the IWK hospital security camera footage, all indicated that an individual who was dressed completely in white walked up to and fired several shots into the Jeep Cherokee. The shooting took place at or around a normal IWK hospital staff shift change, so there was substantial pedestrian and vehicular traffic around the entrance to the hospital at the time of the shooting.

20. HALLETT positively identified the individual who shot him as Aaron MARRIOTT. Although HALLETT was initially reluctant to cooperate with police investigators, he indicated to a police officer who was at the QEII hospital on the night of November 18, 2008, that MARRIOTT was the shooter, and HALLETT has subsequently confirmed this information to the police throughout the investigation into the shooting.

21. MARRIOTT was arrested on December 11, 2008, for shooting HALLETT; the arrest took place after HALLETT had agreed to cooperate with the police investigation.

22. SMITH, LEBLANC, and MURPHY were later arrested for their roles in the shooting, but only after the expiration of the Operation Intrude judicial authorization to intercept communications that yielded the intercepted phone calls relating to the shooting of HALLETT.

23. HALLETT has been placed in witness protection for his safety as a result of his participation in police investigation into the shooting and his testimony at judicial proceedings arising from the shooting.

24. HALLETT has suffered substantial psychological trauma as a result of the shooting. He is unable to maintain the relationships and the lifestyle that he knew prior to the shooting.

[13] After hearing counsels' submissions, the judge accepted their joint recommendation. He sentenced Mr. Marriott to fifteen years' incarceration. His oral decision of May 16, 2011 included:

> I am familiar with the principles and objectives of sentencing as set out in the **Criminal Code**, and I'm not going to repeat them here. And I'm very familiar with the similar cases that have been provided to me by counsel that helped me determine if the joint recommendation is an appropriate recommendation. And I will say, after consideration of those authorities, I have no difficulty accepting the joint recommendation of 15 years. I recognize that the law says I should accept joint recommendations unless I can articulate a good reason not to, and I have no hesitation in saying, in this case, that I have no such reason that I could possibly articulate.
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> ... Ms. Smith got it right when she described this as a botched first degree murder. ... But when our citizens hear about an attempt to murder someone at 6:45 p.m. at the local maternity and children's hospital, things change considerably. When they hear about someone running up to another person in a vehicle and blasting them three to five times with a high-powered pistol, in the middle of that parking lot, it sends out a message that's new to the general community.
>
> ... But this type of shooting and the great possibility of what one could callously call collateral damage has done great damage to our community and our citizens and their sense of self, well being.
>
> The other tragedy is that Mr. Marriott stands before this court as a 20 year old person who's been in jail for all of his adult life. ...
>
> These factors tell me it's all about accepting peer pressure and wanting to make his mark in the criminal community, without very much

> thought about the consequences of what would happen to the person receiving the damage and himself. In a way, as I was sketching out my remarks, I wanted to say to Mr. Marriott just how lucky he is. It's something I want you to think about in the coming years. Mr. Hallett could be dead, and that would be a lost life, and you could be facing a life sentence with no chance of parole for 25 years.
>
> … But I think it's very clear from the comments of your counsel, and which I know from my own experience, that you must disassociate yourself from your fellow offenders in jail and over the years, if you want to have any chance whatsoever of a better life in your 30s, 40s, and 50s.
>
> … I am going to sentence you to 15 years in prison for your involvement in this offence.

The Appeal:

[14] Mr. Marriott was unrepresented when he filed a Notice of Appeal against sentence with this Court. Among other things, he appealed on "the basis of incompetent counsel." That ground was withdrawn when his current appeal counsel filed an Amended Notice of Appeal, and other grounds including alleged breaches of his *Charter* rights were added.

[15] As mentioned earlier, this panel dealt with certain matters pertaining to the appeal in *Marriott* #1. We found that Mr. Marriott had impliedly waived solicitor-client privilege. This Court subsequently received an affidavit sworn by Mr. Burke, his trial counsel.

[16] On his appeal, Mr. Marriott sought to adduce fresh evidence. His grounds of appeal submit that:

1. the sentence constitutes cruel and unusual punishment pursuant to s.12 of the *Canadian Charter of Rights and Freedoms*;

2. the sentence is demonstrably unfit;

3. the sentence is unduly disparate compared to those of the co-offenders; and

4. notwithstanding the joint recommendation, the trial Judge failed to place sufficient emphasis on mitigating factors.

I will deal with the last three items together. Consequently, there are three matters to be decided: (a) whether to receive fresh evidence on appeal (b) whether the sentence breached s. 12 of the *Charter*, and (c) whether the sentence was demonstrably unfit.

Fresh Evidence Motion:

[17] The appellant moved to introduce evidence which was not presented when he was sentenced because the sentencing went forward by way of joint recommendation.

[18] In *Marriott* #1, Justice Fichaud described the Court's request to Mr. Marriott's counsel to list those items which the appellant says were incorrect in the Agreed Statement of Facts before the sentencing judge and her response. He also summarized extracts from the brief for the fresh evidence motion, which came before us on the appeal:

> [23] On January 8, 2013, Mr. Marriott's counsel filed a letter that said "The Appellant disagrees with" seven points in the statement of facts that had been put to the sentencing judge. Those points of disagreement are significant, and include the wording in the statement of facts that:
>
> > "Marriott made a plan to kill Jason Hallett." (Statement of Fact # 1)
> >
> > "Marriott ... were known to the police to be members of a group working in the illicit drug trade and referring to themselves as the 'Spryfield M.O.B.' " (Statement of Fact # 2)
> >
> > That the victim, Jason Hallett was "a member of a rival gang". (Statement of Fact # 5)
>
> [24] In her written and oral submissions to the Court of Appeal, Mr. Marriott's counsel also contended that, apart from the inaccuracies, the facts put to the sentencing judge were incomplete, as of the date of the sentencing hearing, in a number of material respects.
>
> [25] As to how these alleged inaccuracies and deficiencies came to be in the position jointly stated to the sentencing judge, we have the following. Mr. Marriott's affidavit of September 7, 2012, says:
>
> > 18. I was never shown the agreed statement of facts that formed part of the Crown's brief.

His factum says:

> 1. ... Because of his guilty plea, the facts in relation to the Appellant were not brought forward.

His Brief for the Fresh Evidence Motion says:

> 22. The Appellant was told, by his counsel, that he would have the weekend to think about the proposed sentence.
>
> 25. The Appellant had no opportunity to see the agreed statement of facts, nor any opportunity to review the contents of the Crown's position contained in the Crown's brief filed at his sentencing, that forms the basis of his sentence.
>
> 71. The way the Appellant was sentenced, he was left in the cold with nothing said about him.
>
> 93. ... He is simply stating the fact that he did not see the agreed statement of facts, nor the justification for the Crown's sentence, before his sentencing. As well, the sentence that he received, that was agreed upon by the Crown and his attorney, was not communicated to him until the day before he pleaded guilty to the offence, on which the sentence is based.
>
> 109. The nature of the joint recommendation on sentence in the Appellant's case, that excluded any credit whatsoever for the 2.4 years that the Appellant spent in pre-trial custody, <u>silenced</u> [underlining in the Brief] Mr. Burke, Q.C. from having any opportunity to raise a Charter argument on sentencing.
>
> 156. ... very little about his background was brought to the attention of the Court at his sentencing.
>
> 159. While a pre-sentence report would have been of assistance in the Appellant's case, it was not required for a joint recommendation on sentence, and neither the Crown nor the defence at trial requested that one be prepared.

[19] The appellant's motion to adduce fresh evidence was supported by several affidavits, some with numerous attachments:

(a) Mr. Marriott's affidavit sworn September 7, 2012 which, among other things, deposed that:

(i) he had been charged with three attempted murders, one conspiracy to commit murder and several weapons offences and, in exchange for the dropping of two of the attempted murders and the other charges, he had pled guilty to the attempted murder of Mr. Hallett;

(ii) he was out on his own at age 13, his attempts to return home were unsuccessful;

(iii) his criminal record "consisted of schoolyard quarrels";

(iv) while in pre-trial custody, he was kept in solitary confinement for lengthy periods;

(v) during pre-trial custody, he completed a high school equivalency and was accepted into Acadia University;

(vi) after sentencing, he experienced difficult times in the federal penitentiary system, including segregation; and

(vii) he was eventually transferred to the medium security institution at Drumheller Institution in Alberta, and accepted to Athabasca University.

(b) His Supplementary Affidavit sworn December 5, 2012 which provided further details of the conditions of his pre-trial custody and, in particular, periods of segregation at Central Nova (Burnside) and at the facilities at Southwest Nova and Cape Breton Correctional, and described the complaints he made to prison authorities and their responses;

(c) His Second Supplementary Affidavit sworn June 25, 2013 which supplied additional details regarding his treatment in the correctional institutions;

(d) The affidavit of his appellate counsel sworn on June 28, 2013, to which were appended 11 exhibits intended to provide the full circumstances of the offence for which Mr. Marriott was sentenced. These included a transcript and audio of the police wiretap evidence, a DVD containing police interviews of Mr. Hallett, and surveillance videos of the shooting outside the children's hospital;

(e) A second affidavit from his appellate counsel, also sworn on June 28, 2013, to which were appended documents pertaining to a riot at the Central Nova Scotia Correctional Facility (Burnside) on April 8, 2009 and Mr. Marriott's sentence on September 24, 2010 to four months in custody by Judge D. William MacDonald in an unreported decision, including the transcript of the proceedings and the brief filed by his counsel on *Charter* issues for that matter; and

(f) The affidavit of Donald Bureaux, President of Nova Scotia Community College and part-time lecturer at Acadia University regarding Mr. Marriott's performance in his first year business course.

[20] In response to the appellant's fresh evidence motion, the Crown filed 14 documents. These included correspondence between the Crown Prosecutor at trial and Mr. Burke, material pertaining to previous offences the appellant committed, a 2006 Pre-Sentence Report pertaining to Mr. Marriott, and the sentencing decision pertaining to the appellant's conviction for property damage in relation to the prison riot. Mr. Marriott then filed further material in relation to his earlier convictions.

[21] The hearing of the motion to adduce fresh evidence and the merits of the appeal consumed two days. It commenced with short submissions on whether the Crown should be permitted to cross-examine Mr. Burke on his affidavit. The panel determined that this was appropriate. Each of Crown counsel and counsel for the appellant cross-examined Mr. Burke. The Crown's cross-examination of Mr. Marriott on his affidavit evidence was followed by re-direct by the appellant's counsel. His counsel then cross-examined Cst. Benny Kirton on his affidavit and played portions of the DVD video pertaining to the shooting of Mr. Hallett in the hospital parking lot. On the second day of the hearing, counsel presented their submissions on the fresh evidence motion and the appeal.

[22] Fresh evidence may be received provided the criteria in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 as modified by *R. v. Lévesque*, 2000 SCC 47 are satisfied. The evidence should generally not be admissible if, by due diligence, it could have been adduced at trial; however, this criteria will not be applied as strictly in criminal cases as in civil cases. The fresh evidence must be relevant and probative and, when taken with the other evidence adduced at trial, must be expected to have affected the result. The admissibility criteria are the same for appeals against sentence as they are for appeals from verdict: *Lévesque* at ¶ 22.

[23] In this case, the proffered fresh evidence was not presented to the judge at the sentencing hearing because sentencing proceeded by way of a joint submission. While some of it may have been available then, an appeal against sentencing in the circumstances of this proceeding persuades me that the somewhat relaxed due diligence criteria in criminal proceedings has been satisfied.

[24] I also accept that the material tendered as fresh evidence is relevant and credible, and could have affected the result, namely the sentence imposed on the appellant. In doing so, I observe that whether some of the material was in admissible form may be questionable; however, I need not decide that aspect to determine this appeal.

Cruel and Unusual Punishment:

[25] The appellant submits that it was the actions by the state that led to inaccurate and incomplete material in the statement of facts before the judge at his sentencing. This then resulted in mitigating circumstances not being presented, including his being subjected to cruel and unusual punishment contrary to s. 12 of the *Charter* while incarcerated.

[26] His affidavit evidence shows that while incarcerated before sentencing, Mr. Marriott was subjected to several periods of segregation. These included ten days of solitary for a fight, 73 days pursuant to a mischief charge arising out of a prison riot, ten days segregation for a fight in the back of the sheriff's van, 15 days segregation for another fight, and 11 days segregation for making liquor. He claims that on other occasions, other inmates caused disruptions for which he was also blamed and ended up in segregation. He complains that during periods of segregation, he was locked down for 20 to 24 hours a day, refused fresh air almost every day and forced to wear handcuffs.

[27] The appellant deposed that after sentencing in the spring of 2011, he was held in administrative segregation for months during which he was locked down 22 to 23 hours a day, and only allowed to shower every second day. He complained several times to the authorities at the correctional institutions about his treatment when he had not been in any trouble there. In a request to see a psychologist, the appellant explained that he felt like a fish in a fish bowl, and had a permanent headache and severe anxiety when he had never had anxiety before. According to his affidavit, a security intelligence officer told him that he was held in segregation

because previously the institution had a lot of problems with people from Spryfield or those who associated with them.

[28] The appellant raises this *Charter* argument for the first time on appeal. Generally, new grounds on appeal are allowed only in exceptional circumstances. The appellate court has no trial decision to review and the record is often insufficient: *R. v. Phillips*, 2006 NSCA 135, at ¶ 30-33.

[29] In her dissenting judgment in *R. v. Brown*, [1993] 2 S.C.R. 918 (S.C.C.), L'Heureux-Dubé J. explained the rationale for the prohibition at pp. 923-24:

> . . . [T]he general prohibition against new arguments on appeal supports the overarching societal interest in the finality of litigation in criminal matters. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases. Moreover, society's expectation that criminal matters will be disposed of fairly and fully at the first instance and its respect for the administration of justice would be undermined. Juries would rightfully be uncertain if they were fulfilling an important societal function or merely wasting their time. For these reasons, courts have always adhered closely to the rule that such tactics will not be permitted.

She also set out at p. 927 the factors that must be satisfied before a new issue, including a *Charter* challenge, is permitted on appeal:

> … First, there must be a sufficient evidentiary record to resolve the issue. Second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial. Third, the court must be satisfied that no miscarriage of justice will result from the refusal to raise such new issue on appeal.

[30] Does the record indicate that the appellant's failure to bring forward *Charter* arguments based on segregation he experienced while incarcerated prior to sentencing was other than a tactical decision? I am not persuaded that it was.

[31] It was no surprise to Mr. Marriott that he was likely to be segregated after sentencing. He was in the courtroom when his trial counsel, in making his submissions to the sentencing judge, spoke of Mr. Marriott knowing that because of "past associations", "he will be segregated" and that his imprisonment would be

a matter of control rather than meaningful rehabilitation. The appellant made no protest regarding these comments.

[32] Mr. Marriott was also well aware that *Charter* arguments could be raised. After all, he had relied on s. 11(h) of the *Charter* at the September 2010 hearing in regard to the property damage charges arising from the prison riot, for which he was sentenced to four months imprisonment. Yet, at his sentencing in May 2011 for attempted murder, a far more serious charge, for which the Crown was seeking 15 years on a go forward basis, he was silent in regard to *Charter* issues. Even when he himself was given an opportunity to address the court, the appellant made no complaint about the conditions of his incarceration as described in his affidavit evidence.

[33] Mr. Marriott, in his written and oral submissions, argues that the joint recommendation "silenced" Mr. Burke from having any opportunity to raise a *Charter* argument on sentencing. However, all that was elicited from trial counsel during cross-examination before this panel was that, had he walked in at sentencing and started raising any issues, such as *Charter* arguments,

> "the thing would have come to an abrupt halt and ... I would expect the matter would have been adjourned and there would have been a great deal of discussion as to what, what's the next procedure."

The "thing" to which Mr. Burke was referring was the negotiated joint submission. His evidence does not amount to anything more than the reality that, the Crown and trial counsel having come to an agreement, any last-minute challenges or deviations would unwind the joint submission.

[34] It appears that the appellant is equating the fact of segregation with *prima facie* cruel and unusual punishment, contrary to s. 12 of the *Charter*. But segregation is not an automatic breach of that *Charter* right. In *R. v. Olson* (1987), 38 C.C.C. (3d) 534 (Ont. C.A.), aff'd [1989] 1 S.C.R. 296 (S.C.C.), the appellant inmate submitted that his confinement to his cell for 23 hours each day amounted to cruel or unusual punishment. Brooke, J.A. writing for the Ontario Court of Appeal stated at ¶ 41 that "[s]egregation to a prison within a prison is not, *per se*, cruel and unusual treatment … [but] it may become so if it is so excessive as to outrage standards of decency." In his reasons, he observed at ¶ 32 that:

> … Unlike the complaints in *McCann v. The Queen* (1975), 29 C.C.C. (2d) 337, 68 D.L.R. (3d) 661, [1976] 1 F.C. 570 (T.D.), the appellant has not complained about

> the nature of the place or cleanliness or the lack of food or reasonable comfort, or brutality or conduct which one might think is not necessary for security, nor does he complain that he is arbitrarily denied any privileges ordinarily enjoyed by other inmates save those excluded by the nature of his confinement. …

After reviewing all the evidence, he determined that the long-term segregation in that case was not so excessive as to amount to a *Charter* breach. The Supreme Court of Canada affirmed his decision on a different, narrow issue, which did not require it to comment or endorse Brooke J.A.'s reasoning.

[35] Thus, *Olson* is the leading case on whether segregation constitutes "treatment that is so excessive as to outrage standards of decency". Since that decision, several cases from trial courts across Canada have found that segregation does not constitute a breach of s. 12 of the *Charter*. These include *McArthur v. Regina Correctional Centre*, (1990), 56 C.C.C. (3d) 151 (Sask. Q.B.), *R. v. Chan*, 2005 ABQB 615, *R. v. Munoz*, 2006 ABQB 901, *Wu v. Canada (Attorney General)*, 2006 BCSC 44, *R. v. Aziga*, [2008] O.J. No. 3052 (Ont. S.C.J.), *Trang v. Alberta (Edmonton Remand Centre)*, 2010 ABQB 6, *R. v. Farrell*, 2011 ONSC 2160, and *R. v. Jerace*, 2011 ABQB 50.

[36] *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805, appears to be the one reported case where a judge found a s. 12 *Charter* breach based on segregation. There the appellant successfully sought a writ of *habeas corpus* with *certiorari* in aid seeking release from administrative segregation while awaiting trial for first degree murder. The judge found significant violations of the B.C. *Corrections Act*. The warden of the institution was found to have (¶ 352) "exercised the powers vested in her: (a) for the improper purpose of assisting the police in its criminal investigation; [and] (b) in a manner that has improperly fettered her discretion by allowing the police to unduly influence the petitioner's placement in separate confinement."

[37] Mr. Bacon was locked up for 23 hours a day; he had dirty bedding, cold food and no access to a pen. The lights were left on in his cell 24 hours a day and a video camera in his cell recorded and monitored his activities. With respect to communications, there were restrictions on Bacon's ability to use the telephone, a restriction on all visits except by legal counsel and restrictions on his mail delivery. He was also denied use of an inhaler for asthma. Justice McEwan concluded at ¶ 353:

> The respondent is in breach of s. 12 of the *Charter* in arbitrarily placing the petitioner in solitary confinement, in failing to appropriately mitigate his circumstances in solitary confinement, and in unlawfully denying him the other rights to which he was entitled, significantly threatening his psychological integrity and well-being. These impositions collectively amount to cruel and unusual treatment.

[38] All of the cases on whether s. 12 rights were breached as a result of segregation are heavily fact-specific; the conditions, duration and reasons for segregation must all be considered. Moreover, it is essential that there be a proper evidentiary record for the proper consideration of a *Charter* issue.

[39] The jurisprudence indicates that the courts do not lightly interfere with the administration of correctional and detention facilities. For example, in *Aziga*, Justice Lofchik stated at ¶ 34:

> It is recognized that the courts ought to be extremely careful not to unnecessarily interfere with the administration of detention facilities such as the Hamilton-Wentworth Detention Centre where the Applicant is currently held. Unless there has been a manifest violation of a constitutionally guaranteed right, prevailing jurisprudence indicates that it is not generally open to the courts to question or second guess the judgment of institutional officials. Prison administrators should be accorded a wide range of deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and maintain institutional security.
>
> *Maltbey v. Saskatchewan (A.G.)*, [1982] S.J. No. 871 (Q.B.) at paras. 20 and 41; appeal denied (1984), 10 D.L.R. (4th) 745 (Sask. CA).
>
> *Almrei v. Canada (A.G.)*, [2003] O.J. No. 5198 (S.C.J.) at para. 18.

[40] Moreover, disciplinary segregation has not been considered a s. 12 breach. *Aziga* at ¶ 51-52 reads:

> As set out above, in certain instances the Applicant was found to have committed (and/or admitted to) an act of inmate misconduct for which he was sanctioned with of (sic) close confinement. Incidents for which the Applicant was found guilty of misconduct and sanctioned for his misbehaviour cannot possibly form the basis of a Section 12 Charter challenge. This hearing is not an appropriate forum for the Applicant to seek to overturn any earlier inmate disciplinary findings given the Ministry statutory review process for inmate misconduct matters which the Applicant has not followed.

> In respect of the Applicant's time spent in close custody detention as a sanction for inmate misconduct, the courts generally have rejected the suggestion that this form of detention per se violates Section 12 of the Charter. The judiciary has been reluctant to second guess administrative decisions made by institutional officials of this nature, which reflect their special knowledge and expertise with matters relating to institutional safety and security.
>
> - *McArthur v. Regina Regional Centre* (1990), 56 C.C.C. (3d) 151.
> - *R. v. Olson* (1987), 62 O.R. (2d) 321 (C.A.) at 333-336.
>
> [Emphasis added]

See also *Trang* at ¶ 1035-1036 which referred to decisions where lengthy periods of disciplinary and administrative segregation did not amount to a s. 12 breach.

[41] In this case, it appears that most of the appellant's time in segregation before sentencing were sanctions for misbehaviour such as fights and participation in a prison riot. This was disciplinary segregation. The remainder are instances where the appellant claims he was a bystander or not the instigator. It appears the institution imposed segregation for purposes of internal order, discipline and security. I would be reluctant to interfere with its judgment in those matters. This segregation does not rise to cruel and unusual punishment.

[42] I then turn to the periods of segregation after sentencing. According to the appellant's affidavit evidence, he filed several complaints and grievances. The earlier ones, made before a correctional plan was completed for him, were about lack of access to programs. In rejecting subsequent complaints seeking reasons for why he was "locked down 23 hours a day even though I am not on sanctions", the institution denied his claim of 23 hours daily lockdown, saying that he had been given access to showers, outside recreation and gymnasium recreation.

[43] In responding to a later grievance regarding his segregation status, the institution wrote in October 2011:

> … You were segregated for being an associate of the Spryfield MOB. Your association with the gang and the threat that this gang poses as a group in General Open Population creates a risk that is not assumable. However, you have been taken off segregation status at your 5 day review and are now following an enhanced structure routine in unit 3. …

The appellant's continued complaints and grievances did not deny the correctness of the affiliation with a gang described in this response. On November 7, 2011 in

answer to his second level grievance about having been placed in administrative segregation since his arrival in May 2011, the Assistant Deputy Commissioner, Atlantic Region, wrote:

> "[s]ubsequent to your arrival, file information obtained through the RCMP indicated that you were a member of a criminal organization …"

She then set out the relevant material including portions of *CD 568-3 Identification and Management of Criminal Organizations* and the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 on administrative segregation. Her letter ended:

> To conclude, we were informed by your Parole Officer that your Case Management Team is currently working on an Inter-regional transfer to another region. This would certainly allow you an integration in the general open population.

The appellant has not been in segregation since his transfer out of the Atlantic Region.

[44] I do not doubt that the appellant found his periods of disciplinary and administrative segregation personally very difficult, and even harsh. He was a young man with no adult offences before the attempted murder and property damage pursuant to the prison riot; it was his first time in prison. Not everything was done in strict accordance with time lines in the legislation and subordinate legislation, and he had to wait for responses to his complaints. However, it appears that with regard the administrative segregation which followed his sentencing, the institution officials made decisions "which reflect their special knowledge and expertise with matters relating to institutional safety and security." Based on the record before me, I cannot agree that this segregation amounted to a breach of s. 12.

[45] It may also be that the Court of Appeal is not the proper forum to hear complaints of conditions in prison post-sentence. Mr. Marriott did not dispute that the venues for redress set out in the Crown's argument in this respect were incorrect, or were not or are not, available to him. The Crown's factum reads in part:

> 35. … At the time of any segregation, the Appellant had the following options:
>
> (i) seeking a writ of *habeas corpus* in Supreme Court;

(ii) seeking judicial review of the administrative decisions in Federal Court;

(iii) launching a claim of civil tort and/or constitutional tort in Supreme Court.

[*R. v. Farrell*, 2011 ONSC 2160 ...; *R. v. VandenElsen-Finck*, 2005 NSSC 71 ...; *Samms v. Atlantic Institution*, 2004 NBQB 140 ...; *May v. Ferndale Institution*, 2005 SCC 82 ...; *Canada (A-G) v. McArthur*, 2010 SCC 63 ...; *R. v. Aziga*, 2008 CarswellOnt 4619 (S.C.) ....]

36. He may still sue, should he wish.

[46] For all of the above reasons, I would dismiss the appellant's claim of cruel and unusual punishment and a breach of s. 12 of the *Charter* while he was incarcerated before and after he was sentenced.

The Fitness of the Sentence:

[47] Mr. Marriott argues that although his sentencing proceeded by way of joint recommendation reached by the Crown and his trial counsel, Mr. Burke, and they made oral submissions to the judge as well, the judge erred by imposing a sentence that is demonstrably unfit.

[48] In his summary factum, which incorporated an earlier factum, an earlier brief and previous correspondence to the court, Mr. Marriott stated the issue on his appeal thus:

> "Should the Appellant, who had no home, employment or school, receive double the length of the sentence of the actual perpetrators of the offence?

[49] Mr. Marriott was sentenced to 15 years on a go forward basis. What he considers a fit sentence for himself is a ten-year sentence, less a credit of 4.8 years, being his 2.4 years in remand at 2:1. The result would be a sentence of 5.2 years going forward from the date of his original sentence.

(a) Standard of Review

[50] The Supreme Court of Canada recently reiterated the standard of review for appeals from sentence in *R. v. Nasogaluak*, 2010 SCC 6:

> [46] Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:
>
> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

[51] Here, the sentence was the product of a joint submission. Is the standard of review different when a sentence is imposed in that circumstance? In *R. v. A.N.*, 2011 NSCA 21, where there had been a joint recommendation, this Court accepted the same approach:

> [16] The parties agree to the standard of review stated by Justice Saunders in *R. v. Knockwood*, 2009 NSCA 98:
>
> > [11] There is no dispute as to the proper standard of review in this case. This Court's review of a sentencing order is a highly respectful one. We must show great deference whenever we are asked to consider appeals against sentence. Absent an error in principle, a failure to consider a relevant factor, or an over-emphasis of appropriate factors, we should only vary a sentence imposed at trial if we are convinced that the sentence is demonstrably unfit. See for example, *R. v. L.M.*, 2008 SCC 31; *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500; *R. v. Longaphy*, 2000 NSCA 136 and *R. v. Conway*, 2009 NSCA 95.
>
> See also *R. v. Solowan*, [2008] 3 S.C.R. 309, para. 16 and *R. v. McDonnell*, [1997] 1 S.C.R. 948, paras. 15-17. Similarly, in *R. v. Markie*, 2009 NSCA 119, Justice Hamilton said:

> [11] The parties agree the standard of review is one of deference as set out in *R. v. Longaphy*, 2000 NSCA 136:
>
> > 20 A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374.

See also *R. v. Starratt*, 2007 NSCA 21 and *R. v. Markie*, 2009 NSCA 119; both appeals of joint submissions wherein the court relied upon *Longaphy*.

[52] I observe that none of the appellants in *A.N.*, *Markie* or *Starratt* complained that the jointly recommended sentence was unfit, as does Mr. Marriott in this appeal. In those three decisions, as in the vast majority of appeals of joint recommendation, the judge rejected the joint recommendation.

[53] However, on an appeal taken against sentence, s. 687 of the *Criminal Code* requires this court to "consider the fitness of the sentence appealed against". Whether or not the sentence was imposed pursuant to a joint recommendation, the analysis will include a determination of whether the judge made any error in principle and whether the sentence was demonstrably unfit.

[54] Neither the Supreme Court of Canada, nor any Canadian appellate court, has closely examined whether the standard of review changes depending on whether there is a joint recommendation. In *R. v. Levesque*, 2012 ONCA 231 at ¶ 1, the Ontario Court of Appeal declined to address the issue.

[55] It may be that the standard on review on an appeal from sentence imposed pursuant to a joint recommendation accepted by the judge and, particularly where there is no allegation of ineffective assistance of counsel such that the plea bargain amounted to a miscarriage of justice, should attract different or a higher level of defence. This is not the case for determining this issue. Counsel did not raise the matter. Moreover, it is not necessary for the determination of this appeal. For this appeal, I will give the same level of deference and adopts the same principles as for an appeal of any sentence.

(b) Demonstrably Unfit Sentence

[56] In arguing that his sentence was demonstrably unfit, Mr. Marriott raised a number of matters. These included submissions pertaining to alleged errors in the Agreed Statement of Facts the Crown presented to the sentencing judge. According to the appellant, he had not had the requisite intent for attempted murder, the offence for which he had been sentenced. He also suggested that his having been ordered to shoot the victim and his having acted in self-defence were overlooked. He argued that the judge failed to consider parity and proportionality, and to give him credit for time in remand.

(i) The Agreed Statement of Facts

[57] In his summary factum, the appellant argues that he received double the sentence of two co-accused he describes as the "actual . . . perpetrators" of the shooting "because the Crown selected the facts they wanted the Court to hear." He maintains that the Crown forced his trial counsel to accept the sentence and no credit for remand, was late providing the Agreed Statement of Facts to his trial counsel and the court, his counsel had insufficient time to review it, he himself had never seen it, and the judge had not read it thoroughly before the sentencing proceeding.

[58] As indicated earlier, Mr. Marriott does not suggest that Mr. Burke, acknowledged to be a very experienced criminal lawyer, was ineffective. Rather, on multiple occasions, he emphasized that ineffective assistance of counsel was <u>not</u> a ground of appeal. What he says in claiming that the actions of the state resulted in a demonstrably unfit sentence is that his counsel was overcome by the hard position taken by the Crown in its negotiations, which resulted in the joint recommendation of 15 years imprisonment.

[59] With respect, I see nothing in the record that supports the appellant's argument in this regard. Rather, the evidence before me is to the contrary.

[60] In his testimony, Mr. Burke stated that there were three separate instances where Mr. Marriott was alleged to have attempted to murder Mr. Hallett. He was the appellant's counsel at two preliminary inquiries which the appellant attended. As to the facts presented by the Crown and whether he was disadvantaged by its late filing or coerced into agreement with the Crown's position, Mr. Burke testified under cross-examination by the Crown:

...

Mr. Scott: Did you ever have any misunderstandings or did you ever perceive any misunderstandings from Mr. Marriott about what the Crown's allegations were in this case?

Mr. Burke: No the, at the conclusion of the preliminary inquiry, I met with Mr. Marriott and discussed the evidence, discussed the I guess the possibility of him giving evidence on his own behalf in respect to one or more of these charges. I received his advice with respect to his taking the stand. I then discussed it further with him that if indeed the Crown were to lay the evidence before a court in the absence of any contradictory evidence what the probable outcome could be. Especially when we were carrying two additional attempt murder charges which was always first and foremost in our discussions.

Mr. Scott: Okay.

Mr. Burke: As, it was very clear that Mr. Marriott was facing three separate incidents where the allegation is he attempted to murder this particular fellow.

...

Mr. Scott: Okay. And was there anything about those facts that took you by surprise in light of how the prosecution had advanced at that point?

Mr. Burke: No, I did recall that the brief came in late. I do recall reviewing the facts in the brief.

Mr. Scott: Um hum

Mr. Burke: I do not recall any facts that were in the brief that I was unfamiliar with or that I took issue with.

Mr. Scott: Okay.

Mr. Burke: And, if there had been, okay, the matter would not have proceeded but

Mr. Scott: Sorry, can you elaborate on that please?

Mr. Burke: Well obviously if I took issue with the fact in the Crown's brief, I would ask that the matter be adjourned especially given the lateness of the delivery of the Crown's brief.

Mr. Scott: Okay.

Mr. Burke: Consequently, I would check with my client, that if I had a problem with facts then that he may have a problem with the facts as well. So consequently, and my

client and I had talked about the facts at length and I think he was quite familiar with them, as was I.

Mr. Scott: Alright.

Mr. Burke: And so consequently, I had no issue with the facts and the matter proceeding.

Mr. Scott: Alright. Did the timing of when you received the Crown brief in any way prevent you from representing your client on the 16th of May at the sentencing hearing?

Mr. Burke: No.

Mr. Scott: Did you feel like you were being bullied by the Crown in agreeing with the facts by receiving at that time?

Mr. Burke: Was I bullied?

Mr. Scott: Bullied.

Mr. Burke: No. No. I know that if indeed I had taken issue with the any of the facts there that it would have been appropriate to have the matter adjourned until such time as that matter got resolved.

[61] In his cross-examination of Mr. Burke, the Crown referred to the sentencing hearing and the recess requested by Mr. Marriott before he addressed the court. The recess lasted about an hour, after which the appellant rose in court and took full responsibility for shooting Mr. Hallett. He apologized not only to the public and his family, but also to Messrs. LeBlanc and Murphy whom he described as "completely innocent."

[62] Mr. Burke confirmed that he did not meet Mr. Marriott during the recess. The cross-examination continued:

Mr. Scott: Okay. At any point did Mr. Marriott at this time indicate any disagreement with facts that were either related by the Crown

Mr. Burke: No.

Mr. Scott: or you? Okay. I'm sorry, just wondering if you can verbalize that for the record.

Mr. Burke: No, he did not express any disagreement to me at any time as to the facts that had been outlined.

...

> **Mr. Scott:** Okay. And can you indicate to the court whether Mr. Marriott ever instructed you to plea enter a guilty plea on his behalf on any facts other than those alleged by the Crown?
>
> **Mr. Burke:** No.

[63] Mr. Marriott's counsel then questioned Mr. Burke. Asked by Ms. Cooper what opportunity he had had to explore the salient facts, Mr. Burke specifically recalled a meeting with the Crown prosecutor that "involved a great deal of discussion about the facts". He continued:

> **Mr. Burke:** … I was familiar with the facts as there was a fair bit of evidence given at the preliminary about what indeed happened that evening. In addition, there were video that was watched, there was audio, and that that's why quite frankly when I received the facts they basically confirmed what I had known for sometime as to the details of what what occurred that particular evening.
>
> **Ms. Cooper:** Right, but due to
>
> **Mr. Burke:** It wasn't surprising. She never provided those facts to me a week or a month before. I grant you that and I don't take issue with that. She was late in getting that to me. It was a joint recommendation which you know was being put to the court and given that it was a joint recommendation and that I wasn't arguing sentence, I wouldn't have had the same concerns say that if I had if we were arguing sentence and there were issues with respect to the facts that could affect the sentence. Obviously if you are arguing sentence, the facts become a much greater issue in the court and between counsel.

[64] Mr. Burke gave his evidence in a straightforward and candid manner. His testimony makes it clear that, despite its late filing, he had had sufficient time to review the Crown's brief. Moreover, the Crown's hard bargaining had not forced him into any corner. Had he thought that any facts the Crown recounted were improper, Mr. Burke was prepared to seek an adjournment. He was obviously startled by the suggestion that he might have been bullied by the Crown into accepting incorrect facts. His then client never indicated either during the sentencing proceeding or during the hour long recess that there was any problem whatsoever with any of the facts. Mr. Burke testified that he was "quite surprised" when Mr. Marriott addressed the court, and that he had not had any discussions with him about the version of events that he gave at that time.

[65] In his evidence, Mr. Marriott deposed and testified that he had never seen the Crown's Agreed Statement of Facts and had had no opportunity to review its brief. But it is uncontested that the appellant had attended the preliminary inquiries pursuant to the charges which alleged several attempts to shoot Mr. Hallett; he heard the Crown's case against him. Moreover, it was not disputed that he had had discussions with his trial counsel. Mr. Burke testified that after those preliminary inquiries, he had discussed the evidence against the appellant with him. In his submissions at the sentencing hearing, trial counsel also spoke of "extensive discussions with my client" before the joint sentence recommendation was reached.

[66] In one of his briefs, Mr. Marriott argued that the sentence to which the Crown and his trial counsel agreed, was not communicated to him until just the day before he pled guilty to the offence. But under cross-examination at the hearing of the appeal, Mr. Burke testified:

> **Mr. Burke:** ...But in this particular case, the elephant that was in the room at all times were these two other charges. Obviously that was of great concern to me, it was of great concern to my client and we had you know, the Crown and I had great discussions about the three charges. My client and I had great discussion about the three charges. Consequently, when I spoke to Mr. Marriott about the bottom line for the Crown, it was then and it's still is my practice that when I seek a final decision from my client, I essentially ask him to think about it. Normally, I would go over on a Friday or I would go over on a Thursday and I'd basically say to him, don't give me an answer now, think about it, take your time, I'm not rushing you with respect to making a decision. And that's what I did here. The next meeting that I had with Mr. Marriott, I recall, was that he told me that he was accepting it, that he had discussed it fully with his family, that he wanted to get on with his life, and consequently he was going to proceed in the manner that had been outlined by the Crown.

[67] In view of the evidence from the appellant and his trial counsel regarding the appellant's attendance at the preliminary inquiries and their discussions regarding the evidence, I am satisfied that even if he had not received a hard copy of the Crown's brief and reviewed it, Mr. Marriott understood the case against him on the charge of attempted murder and the facts upon which the Crown would be relying.

(ii) Mitigating Factors

[68] There was no pre-sentence report and the Crown's brief to the sentencing judge did state that there was "a complete absence of mitigating factors". The appellant argues that "he was left in the cold with nothing said about him". In particular, he alleges a dearth of information about his background, and a misunderstanding of his criminal record. He says that at the time of the offence he was not in school, was unemployed and had no home, but was highly intelligent and showed potential. According to the appellant, none of this information was presented to the judge who consequently did not take it into account.

[69] The record shows that both counsel advised the court that Mr. Marriott was 20 when sentenced. In his submissions, Mr. Burke brought a number of circumstances to the judge's attention. He pointed out that the victim of the shooting, Mr. Hallett, had himself been carrying a loaded handgun at the time and asked that these "special circumstances" as they relate to the victim be taken into consideration. He stated that the appellant had had "a rough history", "a rough upbringing", not through any fault of his parents, but because of the environment where he comes from and the people he hangs around with. He also advised that, while in pre-trial custody, the appellant had completed his high school equivalency, had taken the initiative to find out how to enroll and did enroll at Acadia University, and had scored 92.5 percent on the written portion of the one course he had completed. Trial counsel pointed out that the appellant had taken it upon himself to try and change his life.

[70] The records shows that the appellant's claim that information about him was omitted is not well-founded. The sentencing judge was alerted to many of the appellant's circumstances through the oral submissions. Any that remained missing were not before him because Mr. Burke did not raise them in his oral submissions, or call for the preparation of an updated pre-sentence report. In the absence of any claim of ineffective assistance of counsel, I cannot accept the appellant's argument.

(iii) Criminal Record

[71] At the sentencing hearing, the Crown reported that Mr. Marriott had 22 prior convictions, all within the previous seven years, and he had committed all of them except one while a youth. According to the Crown, his record included "crimes of violence, weapons offences and drug trafficking". On appeal, the appellant objects to this characterization of his criminal record. In his affidavit evidence, he dismissed his criminal record as one which merely "consists of school

yard quarrels including one where I used a jack knife and one where I took a bank card but returned it to the boy I took it from."

[72] On cross-examination, the appellant acknowledged that in September 2005, he had pepper-sprayed a man who tried to retrieve his boy's bicycle which Mr. Marriott had taken. He agreed that that was not a school yard situation. He also admitted that in December 2005, when he robbed someone of his bank card and cell phone near Pizza Corner, he had stabbed the person he robbed. He agreed that that was not a schoolyard quarrel either.

[73] In my view, in the face of his own concessions, Mr. Marriott's suggestion that the Crown incorrectly described his record as including matters more serious than "schoolyard quarrels" cannot be sustained.

(iv) Intent to Kill

[74] Under cross-examination of his affidavit evidence, Mr. Marriott confirmed that he had plead guilty to attempted murder, which he knew was a serious charge. However, asked whether he had understood that intent to kill was an essential element of attempted murder, he answered: "I didn't have intent to kill on my mind. Like I didn't have murder on my mind but firing a gun. I took responsibility for the charge and plead guilty because I did fire the gun." The appellant confirmed that he knew that the Crown's allegation was that he and three others had intended to kill Mr. Hallett that evening, and that he understood that first degree murder involved planning and deliberation. But he maintained that he had not had the specific intent to kill when he fired, and the shot was not directed at anyone. He had simply plead guilty because he was the shooter; that is, for firing the gun.

[75] The Crown questioned Mr. Burke on the mental element required for attempted murder. He confirmed his familiarity with it, and added that he had discussed intent with the appellant in the context of a case where it was alleged that Mr. Marriott had pointed and attempted to fire a gun at someone, but the weapon was inoperable. His evidence continued:

> **Mr. Scott:** Mr. Marriott had testified this morning that he did not intend to kill Jason Hallett at the IWK. Can you indicate whether that was ever discussed between yourself and Mr. Hallett, Mr. Marriott?
>
> **Mr. Burke:** No. That he, he didn't intend to kill him?

> **Mr. Scott:** Yeah.
>
> **Mr. Burke:** No.
>
> **Mr. Scott:** Okay. Do you
>
> **Mr. Burke:** I'm sorry, I don't understand what you mean by that.
>
> **Mr. Scott:** Well he said that he went there and shot at him with a gun but didn't intend to kill him, just wanted to hurt him. Did you have any discussion with Mr. Marriott about that as the basis for attempted murder guilty plea?
>
> **Mr. Burke:** No.
>
> **Mr. Scott:** Would you have advised him to plead guilty if that were the fact, that he was …
>
> **Mr. Burke:** Well, if Mr. Marriott had put that proposition to me what I would have done would be to sit down and discuss the case with him.

[76] Mr. Burke's reaction to this questioning on intent to kill was one of surprise. I accept trial counsel's evidence that he went over the elements of attempted murder with his former client. Having watched and heard Mr. Marriott testify, I would describe him as intelligent, articulate and combative. He withstood questioning without being intimidated. The appellant was originally charged with more than one count of attempted murder, and attended more than one preliminary inquiry in relation to major criminal charges. That such a forthright individual, faced with very serious consequences if found guilty, never thought to mention to his counsel that he did not mean to kill anyone, strikes me as preposterous. That the appellant would make this submission yet, at the same time, not claim ineffective assistance of counsel because his lawyer had not recognized or raised the requisite intent with him, only emphasizes how disingenuous his argument is.

(v) Self Defence

[77] Mr. Marriott also suggested that, in shooting Mr. Hallett, he had been provoked or had acted in self-defence. He did not raise this in earlier proceedings where it would have operated as a complete defence to the charge of attempted murder. Since self-defence does not act as a mitigating factor affecting the fitness of the sentence, it is a bit strange that this is being put forward in an appeal of sentence only. In any event, the appellant's submission is largely based on a Continuation Report written by Cst. Kirton. In that document, the officer

commented that Mr. Marriott was viewed shuffling his feet back "believed to be a result of Jason HALLETT pointing his gun". The appellant also says that the fact that the driver of the Cherokee, in which Mr. Hallett was seated, left the vehicle before the shooting rather than drive away, and Mr. Hallett's statement that he had a loaded gun and watched the appellant approach, suggest that Mr. Hallett was the instigator of the shooting.

[78] In his affidavit filed on this appeal, Cst. Kirton deposed:

> 6. I am the author of a Continuation Report wherein I viewed the security footage and observed Aaron Marriott approach the vehicle in which Jason Hallett was sitting, and observed Mr. Marriott fire a gun towards that vehicle numerous times.
>
> 7. I observed Mr. Marriott's feet shuffling, or stance change while he was firing towards the vehicle.
>
> 8. My comment that Mr. Hallett may have had a gun pointed at Mr. Marriott was based purely on speculation, wondering what may have caused Mr. Marriott to shuffle his feet, or change his stance, in the manner that he did.
>
> 9. There was no evidence within our investigation to suggest that Mr. Hallett, in fact, pointed his gun at Mr. Marriott at any time.

[79] Under cross-examination, Cst. Kirton described his suggestion that Mr. Hallett may have pointed a gun at the appellant as "speculation". The appellant's affidavit evidence did not address self-defence, and he did not give any testimony in support of this claim. In my view, the officer's affidavit and oral evidence are far from sufficient to establish that Mr. Hallett pointed or started to raise his gun at Mr. Marriott. The driver could have left the car for any number of reasons and neither that person nor Mr. Hallett testified as to whether the latter or the appellant was the first to raise his weapon. I have no evidentiary foundation for finding that Mr. Marriott shot Mr. Hallett, in self-defence or because of any action on Mr. Hallett's part.

(vi) Resources of the State

[80] According to the appellant, the state used unprecedented resources to arrest him and to make a case against him. In this regard, he points to an article in the local Chronicle Herald newspaper quoting the Police Chief as saying at an earlier

news conference that the force was "pulling out all the stops to arrest the gunmen" and "were going to put unprecedented resources into this". The article also quoted an officer saying that "[t]his (arrest) [of the appellant] is a result of those unprecedented resources." With respect, assuming this material was admissible, I do not understand how swift and substantial efforts by the police to capture those responsible for a shooting adjacent to a children's hospital which alarmed the public would reduce the appellant's culpability or sentence.

[81] The appellant also claims that the state used its:

> "unprecedented resources … to obtain the evidence of a known, drug addicted, cocaine trafficker [Mr. Hallett], to frame a kid [Mr. Marriott], and put him away for life, and completely ignoring the criminality of the other criminal, rewarding him and giving him the opportunity for a new life"

He argues that initially Mr. Hallett had been reluctant to co-operate with the police and only did so after being induced by promises and threats. Mr. Hallett's credibility would have or could have been tested at the preliminary inquiry by cross-examination by the appellant's trial counsel. There is no claim of ineffective assistance here. This complaint of unprecedented resources being used to "frame" the appellant is overstated.

(vii) Wiretap Evidence

[82] The applicant submits that the wiretap evidence of the calls exchanged with an individual at the hospital and then Messrs. LeBlanc and Murphy in one vehicle, and Messrs. Smith and Marriott in the other, before and at the time of the shooting, was illegal. He says that the authorization for the wiretaps was backdated to the date of the offence and that he should benefit from any doubt as to the actual date on which they were legally authorized.

[83] The fresh evidence the appellant submitted on appeal included what purported to be the final page of the authorization for the wiretap evidence in the case. The last line as typed read "DATED at Halifax Regional Municipality, Nova Scotia, this 19th day of November, 2008". The "19th" had been crossed out and "18th" hand-written above it.

[84] Assuming that this evidence is admissible, it is not so unequivocal as to persuade me that improper motives can be ascribed to the change. For example, it is possible that the document was issued on the 18th, the typed dated was wrong

and simply corrected by the judge who signed the authorization and initialled the new date.

(viii) Directed to Shoot

[85] Mr. Marriott also submitted that certain circumstances under which he shot Mr. Hallett were not emphasized when he was sentenced. This argument is based on the evidence of the telephone calls intercepted by the police, and assumes the validity of the wiretap evidence. When the location of the Cherokee in which Mr. Hallett was seated was identified in the hospital parking lot, Mr. Smith told the appellant to "get out and blaze that Cherokee." Mr. Marriott then proceeded to walk up to that vehicle and fire several shots from a handgun at Mr. Hallett.

[86] However, his evidence under cross-examination at the hearing of his appeal does not support the suggestion that Mr. Marriott felt compelled by Mr. Smith's words to shoot. The appellant confirmed that the Crown's allegation throughout was that he and Messrs. Smith, LeBlanc and Murphy coordinated their efforts to find where Mr. Hallett was so that he could shoot him. The exchange continued:

> **Mr. Scott:** … Are you saying that you acted alone when it came to this shooting of Mr. Hallett?
>
> **Mr. Marriott:** To an extent, yes.
>
> **Mr. Scott:** What do you mean to an extent?
>
> **Mr. Marriott:** I have to take responsibility for what I did. I fired the gun. I can't blame anyone else for that. . . .
>
> **Mr. Scott:** And were you directed by anyone else to do so?
>
> **Mr. Marriott:** No, I basically have to listen to myself kind of thing. I don't know.
>
> **Mr. Scott:** No one told you to shoot at Mr. Hallett?
>
> **Mr. Marriott:** Not to my knowledge, some things happened so fast, one after another, I don't really recall. . . .
>
> **Mr. Scott:** And you stated to Judge Coady when you were being sentenced that you acted alone, right? You stated to him, you didn't even know what

> you're going to do until you'd gotten out of the car and was walking towards Mr. Hallett.
>
> **Mr. Marriott:** That's true.
>
> **Mr. Scott:** That's true? And that's the basis on which you pleaded guilty to attempted murder?
>
> **Mr. Marriott:** On the basis that I did fire the gun at Mr. Hallett in his wrist. So, I plead guilty to attempted murder. . . .
>
> **Mr. Scott:** You're in the car with Smith, right?
>
> **Mr. Marriott:** Yes.
>
> **Mr. Scott:** You didn't have to talk with him on the phone, did you?
>
> **Mr. Marriott:** No.
>
> **Mr. Scott:** And he's saying blaze the Cherokee, right?
>
> **Mr. Marriott:** I just don't recall the conversations and everything. At the night, like it happened so fast, like . . .

[87] The appellant's evidence was either that no one told him to shoot Mr. Hallett, or that he didn't recall because things happened so fast that night. This undermines his argument that it was Mr. Smith who directed him to shoot and that he, a naïve young man with no criminal record other than "schoolyard quarrels" simply followed instructions. Moreover, his address to the judge at his sentencing hearing wherein the appellant stated that he himself did not know what he was going to do as he got out of the car and walked towards the vehicle in which Mr. Hallett was seated, is contrary to his position.

(ix) Remand Credit

[88] Mr. Marriott argues that the judge erred by not reducing his sentence to take into account the 2.4 years he spent in custody. He submits that not only should he have received a 2:1 remand credit but, because of state misconduct and the time he spent in segregation, further enhanced or increased credit.

[89] The appellant was charged in 2008 prior to the enactment of the *Truth in Sentencing Act*, S.C. 2009, c. 29. At that time, s. 719(3) of the *Criminal Code* provided that the sentencing judge "may take into account any time spent in

custody by the person as a result of the offence". While a 2:1 credit for time spent in remand was common practice, various considerations could result in a variation or denial of credit: see, for example, *R. v. LeBlanc*, 2011 NSCA 60 at ¶ 21-22. A 2:1 credit was not a mechanical formula, but it was "entirely appropriate" and remained discretionary: *R. v. Wust*, 2000 SCC 18 at ¶ 44-45, and *R. v. A.N.*, 2011 NSCA 21 at ¶ 41. The sentencing judge's exercise of that discretion was required to be done on a principled basis: *A.N.* at ¶ 40. Since remand credit is discretionary pursuant to s. 719(3), appellant intervention is only warranted where an error in principle or palpable and overriding error has been shown.

[90] Citing *Nasogaluak*, the appellant says that the judge should have exercised his discretion and given him even more than the 2:1 credit because of the misconduct of the state which he says included:

> (i) selecting one criminal over the other to take the wrap (sic), and ignoring the criminality of Mr. Hallett,
>
> [ii] the arbitrary treatment and cruel and unusual punishment, to which the Appellant was subject, at the hands of the authorities, in the prisons in which he was incarcerated, contrary to their own rules.
>
> [iii] the actions of the Crown, in seeking this grossly excessive sentence on the Appellant.

As explained earlier, these allegations of state misconduct have not been substantiated so there is no basis for such further enhancement of any remand credit.

[91] As for any enhanced credit because of segregation, this has been rejected or accepted based on the particular facts of the case. In *R. v. Nehass*, 2010 YKTC 64 at ¶ 12, where segregation had been required to manage the aboriginal offender's oppositional behaviour while in custody – he was being sentenced for twice assaulting police officers in the correctional centre – it was rejected. Segregation did result in a credit in *R. v. Sakebow*, 2012 SKQB 81, where the accused, a long-term offender, was placed in segregation because of information that his life and safety would be threatened if placed in the general population. At ¶ 38, the judge found that as it was not the accused's conduct that resulted in segregation, he was entitled to an increased credit for that time. In *R. v. C.L.*, 2012 ONCA 835, the appellant who had been held in administrative segregation for the 18 month pre-trial period, spending 23 hours a day in his cell, argued that the judge failed to

attach sufficient weight to his harsh segregation conditions in giving him only 1:1 credit. The Court of Appeal determined that the judge acted within his discretion, and considered the administrative segregation conditions but also other factors that weighed against enhanced credit such as the appellant's outstanding charges and having been on bail when he committed the offences for which he was charged.

[92] Here, the segregation for which the appellant claims the judge should have given him remand credit was for disciplinary purposes, arising from his misconduct or, he claims, that of others. In such circumstances, the judge would not have erred by exercising his discretion and denying any credit.

[93] I would add that the judge was made very aware that the jointly submitted sentence of 15 years included some two and one-half years of remand time. The Crown reiterated this in its closing comments. In his submissions at trial, Mr. Burke spoke of "extensive discussions" "ongoing for some considerable period of time" and "extensive discussions with the Crown, as well, extensive discussions with my client, before an agreement was reached". Mr. Burke also spoke of factors including the strength of the Crown's case for this incident and others before the Court. He then addressed the 15 year sentence commencing that day, which recognized or included the appellant's 29 months in pre-trial custody. In these circumstances, where remand time had been taken into account and ineffective assistance of counsel has not been argued, it is difficult to say that the judge erred in not granting remand time.

(x) Proportionality

[94] Mr. Marriott argues that he was sentenced as though he was the sole perpetrator of the offence, without regard to the roles of the other participants, and that his sentence was not proportional to that of the others. He points out that he plead guilty to attempted murder and was sentenced to 15 years on a go forward basis and that the sentences received by the other three co-accused were lighter. Those men were sentenced by the same judge, after Mr. Marriott was. Their sentences were as follows:

> (a) Matthew Murphy was tried and sentenced to five years for attempted murder and conspiracy to commit murder, to be served concurrently: *R. v. Murphy*, 2011 NSSC 410. His appeal to this court was dismissed by a majority: 2012 NSCA 92; his appeal to the Supreme Court of Canada was dismissed: 2013 SCC 21.

(b) Shaun Ryan Smith who plead guilty to conspiracy to commit murder, was sentenced to ten years, less credit for 27 months spent in pre-trial custody, for a sentence of seven years, nine months on a go forward basis, 2011 NSSC 413; and

(c) Jeremy LeBlanc was tried and sentenced to ten years for attempted murder and conspiracy to commit murder, to be served concurrently. He had no pre-trial custody credit available, 2011 NSSC 412.

[95] I will address the appellant's various arguments by:

(a) reviewing how a judge is to proceed when presented with a joint submission on sentence;

(b) considering what the judge did in this case; and

(c) considering the principles of parity and proportionality.

[96] It is useful here to recount that the appellant plead guilty to attempted murder, pursuant to s. 239(1)(a.1) of the *Criminal Code* which stipulates a minimum sentence of four years and a maximum of life imprisonment. While these are the outer limits of the punishment, they do not necessarily denote the range of sentence. In *R. v. E.M.W.*, 2011 NSCA 87, Fichaud, J.A. discussed the meaning of range and the principle of proportionality:

> [29] The statutory maximum term of imprisonment for an offence under s. 271 of the *Code* is ten years. But that does not mean the effective "range" for parity purposes in E.M.W.'s sentencing has a ceiling of ten years. In *R. v. Cromwell*, [2005] N.S.J. No. 428 (C.A.), para 26, Justice Bateman discussed the meaning of "the range":
>
> > [Counsel] broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender ("... sentences imposed upon similar offenders for similar offences committed in similar circumstances ..." per MacEachern, C.J.B.C. in *R. v. Mafi* (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the

> remedial focus required for the particular offender and the need to protect the public. This variation creates the range.

To similar effect *R. v. A.N.*, 2011 NSCA 21, para 34:

> Unless expressed in the *Code*, there is no universal range with fixed boundaries for all instances of an offence: *R. v. M.(C.A.)*, para. 92; *R. v. McDonnell* ([1997] 1 S.C.R. 948), para. 16; *R. v. L.M.*, para. 36. The range moves sympathetically with the circumstances, and is proportionate to the *Code*'s sentencing principles that include fundamentally the offence's gravity and the offender's culpability.

[97] The law is clear that, outside of the joint recommendation context, sentences falling outside of the range of appropriate sentences are not necessarily unfit. In *Nasogaluak*, the Supreme Court of Canada stated:

> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[98] This same reasoning has been applied to joint submissions. In *R. v. Oxford*, 2010 NLCA 45 the Newfoundland Court of Appeal stated:

> **76** If, therefore, a sentence not involving a joint submission and falling outside the regular range of appropriate sentences is not necessarily an unfit sentence, then a fortiori a jointly-submitted sentence will not necessarily be unfit and certainly will not bring the administration of justice into disrepute simply by virtue of the fact that it falls outside the normal range.

Accordingly, sentences imposed by way of joint recommendations which fall outside the range are not necessarily unfit.

[99] I turn then to how a judge is to proceed when counsel present a joint recommendation. In *R. v. MacIvor*, 2003 NSCA 60, Cromwell, J.A. (as he then was) provided this guidance:

> [31] . . . It is not doubted that a joint submission resulting from a plea bargain while not binding on the Court, should be given very serious consideration. This requires the sentencing judge to do more than assess whether it is a sentence he or she would have imposed absent the joint submission: see, e.g., **R. v. Thomas** (2000), 153 Man. R. (2d) 98 (C.A.) at para. 6. It requires the sentencing judge to assess whether the jointly submitted sentence is within an acceptable range - in other words, whether it is a fit sentence. If it is, there must be sound reasons for departing from it: see, for example, **R. v. MacDonald** (2001), 191 N.S.R. (2d) 399; N.S.J. 51 (Q.L.)(N.S.C.A.); **R. v. Tkachuk** (2001), 159 C.C.C. (3d) 434 (Alta. C.A.) at para. 32; **R. v. C.(G.W.)** (2000), 150 C.C.C. (3d) 513 at paras. 17-18; **R. v. Bezdan**, [2001] B.C.J. No. 808 (C.A.) at paras. 14-15; **R. v. Thomas, supra**, at paras. 5-6; **R. v. B.(B.)**, 2002 Carswell NWT 17 (N.T.C.A.) at para. 3; **R. v. Webster** (2001), 207 Sask. R. 257 (C.A.) at para. 7.
>
> [32] Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation.

[100] In *R. v. Cromwell*, 2005 NSCA 137, Bateman, J.A. explained why a judge usually respects a joint recommendation as to sentence arising from a negotiated guilty plea and when a judge might depart from it:

> **RESOLUTION AGEEMENTS**
>
> [18] In **R. v. MacIvor**, this Court approved with particular emphasis, the following comment by Fish, J.A. (as he then was), writing for the Court in **R. v. Douglas** (2002), 162 C.C.C. (3d) 37 (Que. C.A.):
>
> > [51] ....the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty - - provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted.
>
> [19] There are many situations in which it is in the public interest for Crown and defence counsel to enter into negotiations which result in a guilty plea and a joint sentence recommendation. There may be uncertainties in evidence which induce both counsel to prefer a compromise. Avoidance of a trial may save substantial public expense and spare prosecution witnesses the trauma of testifying. A

negotiated resolution, which shortens the time between the charging of the offence and disposition, protects the public from those who would re-offend while on pre-trial release and spares victims of crime the long ordeal of awaiting trial of the perpetrators. Offenders sometimes provide the police with critical information leading to the solution of other crimes. This can serve as a *quid pro quo* for a sentence somewhat reduced from what would otherwise be appropriate. Heavy criminal caseloads resulting in court backlogs can also be alleviated through consensual resolution, in the proper circumstances. Such resolutions are more likely to be achieved where it is probable that the sentencing judge will accept the recommendation of counsel.

[20] Joint sentence submissions arising from a negotiated guilty plea are generally respected by the sentencing judge. Ultimately, however, the judge is the guardian of the public interest and must preserve the reputation of the administration of justice. Where the agreed resolution is contrary to the public interest, would bring the administration of justice into disrepute or is otherwise unreasonable the judge retains the discretion to reject the joint submission (**R. v. Cerasuolo** (2001), 151 C.C.C. (3d) 445 (Ont. C.A.); **R. v. Dorsey** (1999), 123 O.A.C. 342 (C.A.); **R. v. C. (G.W.)** (2000), 150 C.C.C.(3d) 513 (Alta. C.A.)).

[21] A trial judge may decline to give effect to a joint recommendation, not simply because she would have imposed a more severe sanction, but where the sentence is clearly unreasonable and then, only if the judge is satisfied there are no other compelling circumstances justifying, as in the public interest, a departure from an otherwise fit sentence.

FITNESS OF SENTENCE

[22] In **R. v. Shropshire** [1995] 4 S.C.R. 227 an "unfit" sentence is described as one that is "clearly unreasonable" (at para. 46 *per* Iacobucci, J., for a unanimous Court), in other words, "clearly excessive or inadequate" (see also **R. v. Muise** (1995), 94 C.C.C. (3d) 119 (N.S.C.A.)). An unreasonable sentence is one falling outside the range (**Shropshire** at para. 50 and **MacIvor, supra** at para. 31).

[23] In evaluating a joint submission the judge must determine the acceptable range of sentence for the offence before the court. A fit sentence is one that falls within that range. Fixing the range requires a consideration of the general sentencing principles and, for purposes of this case, those of conditional sentencing.

[24] Where there is a joint submission, the judge considers the record before him – the admitted facts of the offence; information about the offender; the victim impact statements and submissions of counsel. It is counsels' obligation to

> provide sufficient detail to justify the joint submission. (**R. v. G.P., supra** at para. 20 and **R. v. Douglas, supra** at para. 45). There are occasions when all relevant factors prompting the joint submission cannot be disclosed to the judge. The offender may have provided useful but confidential information about other crimes, disclosure of which would endanger his safety or compromise an on-going investigation. For that reason, even where a joint submission falls outside the range, it should be given serious consideration (**McIvor, supra** at para. 37).

[101] In *Starratt*, this Court adopted the protocol set out in *R. v. Sinclair*, 2004 MBCA 48 which is consistent with *MacIvor* and *Cromwell*. There, the Manitoba Court of Appeal in regard to joint submissions on sentence outside the range wrote:

> **5** If a sentence recommended by both counsel is outside the range of sentence established by precedent, then the sentencing judge need not follow the joint recommendation. See *R. v. Booh* (I.) (2003), 170 Man.R. (2d) 249, 2003 MBCA 16.
>
> **6** However, even in that situation, a sentencing judge should exercise caution before ignoring a sentence carefully negotiated by experienced counsel. As stated by the Nova Scotia Court of Appeal in *R. v. MacIvor* (2003), 176 C.C.C. (3d) 420, 2003 NSCA 60 (at para. 32):
>
> > Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation.

[102] In summary, if a sentence recommended by both counsel is outside the range of sentence, the judge should give the joint submission "serious consideration" (*MacIvor*) and "exercise caution before ignoring a sentence carefully negotiated by experienced counsel" (*Sinclair*). If the sentence is clearly unreasonable, the judge may only reject the joint submission if satisfied there are no other compelling circumstances justifying, as in the public interest, a departure from an otherwise fit sentence.

[103] How did the sentencing judge in this case proceed? His decision began:

> I am familiar with the principles and objectives of sentencing as set out in the **Criminal Code**, and I'm not going to repeat them here. And I'm very familiar with the similar cases that have been provided to me by counsel that helped me determine if the joint recommendation is an appropriate recommendation. And I will say, after consideration of those authorities, I have no difficulty accepting the

> joint recommendation of 15 years. I recognize that the law says I should accept joint recommendations unless I can articulate a good reason not to, and I have no hesitation in saying, in this case, that I have no such reason that I could possibly articulate.

He accepted the Crown's description of the appellant shooting Mr. Hallett as a "botched first degree murder", and lamented the situation of a young man firing multiple shots with a high-powered pistol in the middle of the parking lot of the local children's hospital.

[104] This is not a situation where the judge found any fault with the joint submission. Rather, after reviewing the statement of facts in the Crown's sentencing brief, hearing the submissions of the Crown and the appellant's trial counsel, and considering the case law, the sentencing judge here assessed whether the jointly submitted sentence was appropriate and determined that it was within an acceptable range.

[105] The appellant submits that he did not give it the requisite "serious consideration" . The judge did not read the Crown's brief before the hearing started. The transcript of the sentencing proceeding shows that at its outset the judge told the Crown that he had not had a chance to read her brief and that he would take time when submissions finished. After the court recessed for an hour and after the appellant's address to the judge but before imposing sentence, the judge told the Crown:

> I just want to say, Ms. Smith, that I had a chance to read your brief, I'm familiar with it. It was a quick read but, nonetheless, I did that.

It was the sentencing judge who set the duration of the recess, and he confirmed that he had had sufficient time to appreciate the material before him.

[106] There is nothing on the record that indicates that the judge did not take into account the factors presented to him by counsel in assessing sentence. Nor is there anything on the record that supports the appellant's claim that he was sentenced as though he was the sole perpetrator of the offence. The facts as presented by the Crown, and the submission the Crown and trial counsel made to the judge, all referred to the involvement and actions of the three other co-accused.

[107] As explained earlier in my decision, none of the matters raised by the appellant pursuant to his fresh evidence motions such as the allegedly incorrect

characterization of his criminal record or his (lack of) intent to commit attempted murder were substantiated. Accordingly, there was nothing omitted or substantially incorrect in the material before the sentencing judge.

[108] Since the judge did not reject the sentence jointly proposed by the Crown and trial counsel as outside the range and thus unfit, there was no need for him to seek further submissions from counsel or to give cogent reasons for not accepting it: *Sinclair* at ¶ 17, as approved by this Court in *Starratt*, at ¶ 12.

[109] Mr. Marriott argues that his sentence lacked parity. Section 718.2(b) of the *Criminal Code* reads:

> Other Sentencing Principles
>
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> …
>
> *(b)* a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> …

As indicated earlier, his sentence was heavier than the sentences later imposed on by his co-accused who received, for attempted murder and conspiracy, ten years concurrent (Mr. LeBlanc) and five years concurrent (Mr. Murphy); and, for conspiracy to commit murder, ten years (Mr. Smith). What the appellant considers would be a fit sentence for himself is ten years, which he says should be reduced by a remand credit already reviewed.

[110] The appellant's parity argument assumes that, because all four accused were sentenced as a result of the same incident which culminated in the shooting of Mr. Hallett at the hospital, his sentence should be calculated only with their sentences in mind. But what the parity principle calls for is a consideration of sentences imposed on "similar offenders for similar offences committed in similar circumstances". There is no constraint limiting the comparable sentences to those of any co-accused.

[111] Moreover, the appellant's actions are distinguishable from those of his co-accused. As he himself says, he was the shooter. It was the appellant who, loaded gun in hand, walked across the parking lot, stopped by the Cherokee, raised and

pointed the gun at Mr. Hallett, and fired it several times. It is an inescapable fact that the appellant shot another person in a public place. I have not accepted from the fresh evidence or his testimony on appeal that he did so without intent to kill or in self-defence or under some form of coercion. A person who commits attempted murder has the specific intent to kill. The fact that the intended victim did not die is simply good fortune. The Supreme Court and this Court have described an attempted murder offender as a "lucky murderer": *R. v. Logan*, [1990] 2 S.C.R. 731 at p. 742-743; *R. v. Bryan*, 2008 NSCA 119, at ¶ 41.

[112] While parity is one of the several sentencing principles, proportionality is the fundamental principle. Section 718.1 establishes that proportionality is most directly concerned with the gravity of the offence and the degree of responsibility of the offence.

> Fundamental Principle
>
> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

It is the individualisation of sentencing that calls on a court to determine a fit sentence with regard to all relevant factors concerning the offence and the offender.

[113] In determining whether a sentence was fit and appropriate in all the circumstances, the case law on sentencing is helpful. The following case summaries, supplied by the Crown, provide guidance:

> (i) *R. v. LeBlanc*, 2011 NSCA 60 … – This Court confirmed sixteen years' incarceration for a botched hit on James Melvin, Jr. The offender and others planned to kill Mr. Melvin and communicated with him in order to ascertain his whereabouts. The offender chased the victim, and fired a handgun a number of times. The victim was struck twice suffering internal injuries for which he received surgery. The Appellant had a lengthy criminal record. There was no joint recommendation;
>
> (ii) *R. v. Smith*, 2012 NSCA 37 … – Seventeen and a half year old offender, nineteen at the time of sentencing, convicted of shooting Michael Patriquen, Jr. at close range in the chest. The victim suffered many health problems, including paraplegia. His life expectancy to be shortened by twenty to twenty-nine years. The victim was shot at the request of an associate of the Appellant. A lengthy

violent criminal record and disturbing psychiatric profile. Fourteen years' incarceration confirmed on appeal;

(iii) *R. v. Clarke*, 2010 ONSC 656 … – Offender shot victim in front of convenience store just after noon. The victim suffered two chest wounds from a sawed-off shotgun at close range. Injuries were life-threatening. Offender had young family. Four prior convictions. Use of handgun in a public place during daylight hours, and reckless disregard for human life factors in informing twelve and a half years' imprisonment minus remand time;

(iv) *R. v. Guedez-Infante*, 2009 ONCA 739 … – Appellant was a young man with no prior criminal record. The shooting, however, took place in public leaving serious injury to the victim. Alcohol involved. Ten years' imprisonment confirmed on appeal;

(v) *R. v. Thompson*, 2009 ONCA 243 … – Few facts in appeal case. Twelve years affirmed on appeal for serious shooting with a handgun planned in advance and committed in a public place by individual with lengthy record, including convictions for violence;

(vi) *R. v. Boissonneault*, 2012 MBCA 40 … – In the days leading up to a shooting in public, the Appellant was drinking, smoking crack cocaine and marijuana, and not sleeping much. He used a 357 Smith and Wesson to shoot the victim while he was sitting in a cab with another person. The Appellant harboured a strong dislike for the victim. The Court of Appeal intervened where trial Judge failed to explain consecutive sentences for firearm convictions which arose as a result of the attempt murder. Seventeen years in total reduced to fourteen years based on totality. Appellant had significant criminal record; however, majority of convictions were drug related. [Appears to be second degree attempted murder.];

(vii) *R. v. Situ*, 2010 ONCA 683 … – Two Appellants involved in horrific shooting in a public place which rendered victim quadriplegic. Situ had a criminal record. Fifteen years' incarceration confirmed on appeal;

(viii) *R. v. Truelove*, 2010 ONCA 608 … – Few facts from Court of Appeal decision. Conviction for attempted murder and several other charges which arose out of a shooting in a nightclub. Thirteen years' incarceration upheld on appeal;

(ix) *R. v. Chevers*, 2011 ONCA 569 … – Appellant twenty-four years old when he twice shot the victim in a public place. He missed both times. Fifteen year sentence upheld on appeal where the Court noted the double-digit prison sentences for attempted murder had been imposed in cases of planned executions involving the use of loaded firearms. Other factors included premeditation, use of

> prohibited handgun, firing two shots, impact on the victim and community, and offender's prior record;
>
> (x) *R. v. Brown*, 2009 ONCA 563 … – At 7 p.m., June 14, 2005 victim shot six times at point-blank range in parking lot. Victim survived, however paralyzed from the waist down. Numerous injuries to critical areas. Appellant was a first offender with a young child. No evidence of rehabilitative potential apart from implication arising from youth. The Court characterized the offence as a cold-blooded senseless act which was unprovoked. Life imprisonment confirmed due to use of gun without warning in a public place where other citizens, including children, were present and at potential risk. Growing gun violence a proper and necessary factor as well.

[114] It appears that the low end of the range for attempted murder is around ten years' imprisonment; the middle around 12; and the high between 15 years and life. See also *R. v. Tan*, 2008 ONCA 574, at ¶ 35 to 39.

[115] In this case, the aggravating factors include:

> (a) The brazen shooting in a hospital parking lot, a public place, in the early evening;
>
> (b) The use of a relatively high-powered handgun;
>
> (c) The firing of multiple shots; and
>
> (d) A lengthy criminal record, albeit mostly a youth record, including crimes of violence and the use of weapons.

The appellant on appeal denies any planning or joint enterprise with the co-accused because the telephone intercepts did not include him taking part in the exchanges as the two vehicles sped to the hospital and Mr. Hallett. However, it is difficult to accept that Mr. Marriott could not have known from hearing the urgency and content of the discussions, that Mr. Hallett was the target.

[116] The firing of multiple shots in a public place shows a callous and high disregard for the safety of others going about their business. The attempted murder calls for denunciation of that unlawful conduct and for deterrence, specific to this offender and general to other members of the public, that such actions will attract heavy penal consequences.

[117] The mitigating factors are the appellant's youth – he was 18 at the time of the shooting – and his guilty plea to attempted murder. Since sentencing, he is doing well in the correctional institution and has shone in his academic studies. However, the appellant did not plead guilty until the first day of trial. He did not do so until after the preliminary inquiries were held, negotiations between the Crown and trial counsel towards resolution of all charges including others of attempted murders were completed, and he had re-elected from trial by judge and jury to judge alone.

[118] Having considered the offence and this offender, and the principles of sentencing and particularly those of proportionality and sentence, it is my view that 15 years imprisonment on a go forward basis may be at the higher end, but is still within the range of sentence. Consequently, it is not a demonstrably unfit sentence.

Disposition

[119] I would admit the fresh evidence, grant leave to appeal but dismiss the appeal.

Oland, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.