

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Sydney, 2012 NSPC 93

Date: 20120927

Docket: 2240954, 58

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

William D. Sydney

Decision

Judge: The Honourable Judge Theodore K. Tax, J.P.C.

Oral Decision: September 27, 2012

Charges: Between the 20th and the 23rd day of October, 2010, at or near Beaverbank, Nova Scotia, did unlawfully assault Pamela Harris, contrary to Section 266 of the Criminal Code.

Utter a threat to Pamela Harris to cause bodily harm or death to the said Pamela Harris contrary to Section 264.1(1)(a) of the Criminal Code.

And further that he at the same time and place aforesaid, while bound by a Probation Order issued on the 11th day of September, 2009, did wilfully fail without reasonable excuse to comply with such order, to wit, “do not be on or within 50 meters of the premises known as 737 Fern Dr., Beaverbank, Nova Scotia or the place of employment of Pamela Harris except: 1) in accordance with a written separation agreement or court order for access to a child or children. 2) if specifically invited by

Pamela Harris and you must immediately remove yourself from the premises if she asks you to leave” contrary to Section 733.1(1)(a) of the Criminal Code.

Counsel:

Alex Keaveny, for the Crown
Patricia Jones, for the Defence

By The Court (Orally):

Introduction

[1] Mr. William Sydney is before the Court with respect to a sentencing decision after having pled guilty to the charges of uttering threats to cause death or bodily harm contrary to section 264.1(1)(a) of the **Code**, assaulting Pamela Harris contrary to section 266 of the **Code** and breaching the terms and conditions of a probation order contrary to section 733.1(1)(a) of the **Criminal Code**. These offences occurred during incidents between October 20th, and October 23rd, 2010 at or near 737 Fern Drive, in Beaverbank, Nova Scotia. The issue for the court is to determine a fit and proper sentence in all of the circumstances of this offence and this particular offender.

[2] The Crown recommends a jail sentence of 90 days followed by a period of probation of 2 years, a section 110 **Criminal Code** firearms order for 5 years and a DNA order under section 487.051 of the **Code** since the assault and threats charges are secondary designated offences.

[3] Defence counsel submits that, in all of the circumstances of the case, a fit and proper sentence would be a conditional sentence order in the range of 6 months followed by a period of probation for 18 months. The Defence has no objection to the ancillary orders.

CIRCUMSTANCES OF THE OFFENCES:

[4] During the early morning hours of October 21, 2010, Mr. Sydney went to 737 Fern Drive in Beaverbank, Nova Scotia which was the residence of his former partner, Pamela Harris. Ms. Harris is the mother of their son, William, who is 3

years old and resides with his mother. Mr. Sydney was intoxicated when he attended at his former partner's residence. He did not have a key to get in the residence and started banging on the door to gain entry. Ms. Harris let him in and scolded him for arriving at that late hour as their son William was at home and still awake because he was sick. Ms. Harris and Mr. Sydney got into a verbal argument about his banging on the door. He became more irate when she called him a "loser" and he eventually threatened to "bash in" her head and to harm her father.

[5] Mr. Sydney refused to leave the residence and eventually grabbed the area of Ms. Harris' head and neck and threw her to the floor. Defence counsel contends that her client did not place Ms. Harris in a "headlock." However, Defence counsel says that Mr. Sydney did attempt to hug Ms. Harris and pick her up. During that contact, his arms accidentally slipped up to her neck and as she resisted him, he let go of her and she slipped and fell to the floor. In response to questions by the court for clarification, although there is a dispute as to the exact manner in which Mr. Sydney applied force to Ms. Harris, it was agreed by counsel that Ms. Harris had not consented to any direct application of force by Mr. Sydney which caused her to fall to the floor.

[6] The Crown also contends that the assault of Ms. Harris by Mr. Sydney caused air to be cut off to her lungs for a second, however, that potentially aggravating factor is disputed by Defence counsel who submits that if it did occur, then that act was not intended, but was completely accidental. Since this remains a disputed fact, I do not rely on it as an aggravating fact as it has not been established by the Crown beyond a reasonable doubt pursuant to section 724(3)(e) of the **Criminal Code**.

[7] In addition, during his recitation of the facts, the Crown Attorney indicated that there was no bruising, no visible bleeding and that Ms. Harris was not hospitalized. However, the Crown Attorney noted, in reviewing the Victim Impact Statement, that Ms. Harris had stated that there was bruising on her neck from the assault. Defence counsel maintains that the disclosed facts upon which her client entered his guilty plea did not contain any reference to bruising, and that this alleged fact was only disclosed well after her client entered his guilty pleas. On further submissions by counsel in relation to this point, Defence counsel added that her client accepted responsibility for the assault of Ms. Harris and therefore, the Defence does not take issue with the fact that some bruising occurred as a result of Mr. Sydney's assault of Ms. Harris.

[8] At the time when Mr. Sydney assaulted Ms. Harris at 737 Fern Drive in Beaverbank, Nova Scotia, he was subject to a probation order made September 11, 2009 which prohibited him from going to that residence. As a result of Mr. Sydney going to the residence of Ms. Harris between the dates alleged in the Information, without her permission, he breached one of the terms of his probation order.

[9] Mr. Sydney spent 2 days on remand before he was released on a Recognizance, dated October 25, 2010, which contained a curfew to remain in his residence between the hours of 10 PM and 6 AM the following day, 7 days per week. Defence counsel submitted that these 2 days in custody had a salutary effect on her client. The Recognizance was varied on February 16, 2011 to allow Mr. Sydney to contact Ms. Harris by telephone for the purpose of arranging access to their child, William, or as set out in a Family Court order.

DEVELOPMENTS AFTER SUBMISSIONS OF COUNSEL:

[10] The facts and circumstances of the offences relied upon by the Crown and the submissions of counsel were made on September 11, 2012 and I reserved my decision on sentencing to September 21, 2012. At the outset of the court's hearing on September 21, 2012, Defence Counsel advised the court that there had been some recent developments, which had just come to her attention and were not known to her when counsel made their submissions. Defence counsel indicated that she was informed that Mr. Sydney was alleged to have breached a term of his Recognizance on September 7, 2012, but the charge in relation to that breach was only laid after the submissions of counsel on September 11, 2012. At Mr. Sydney's first appearance in court on September 13, 2012, he entered a guilty plea to breaching a term of the Recognizance contrary to section 145(3) of the **Code**. He was sentenced to a term of 30 days in prison, to be served intermittently, commencing on September 21, 2012.

[11] As a result of that intermittent sentence having been imposed by the court, Defence Counsel advised that Mr. Sydney has lost the employment as a chef at the restaurant where he would have been working under the "Red Seal" program. Counsel stated that her client believes that he has another job lined up if the court was to impose a conditional sentence order in this case. Defence counsel also indicated that, if the court ordered a jail sentence of 90 days as recommended by the Crown so that the sentence could be served on an intermittent basis, there would be a significant consequence for her client. Counsel stated that, if this court was to order a jail sentence which, when combined with the 30 day sentence imposed on September 13, 2012, exceeded 90 day limit for sentences served on an intermittent basis, the consequence of this court's order would result in an

aggregate sentence requiring Mr. Sydney to serve that sentence on a straight time basis in a correctional centre. In that event, her client would not be able to work and his ability to make financial support payments for his son would be impacted.

[12] Defence counsel also added that since the initial submissions were made on September 11, 2012, the parties have appeared in Family Court and it is now quite clear that Ms. Harris does not wish to have any direct or indirect contact with Mr. Sydney. In addition, counsel also advised the court that the Family Court order does allow for access to their child, William, through an agreed-upon 3rd party. The recent proceedings in the Family Court have clarified Ms. Harris' position with respect to the issue of ongoing contact or communication with Mr. Sydney.

CIRCUMSTANCES OF THE OFFENDER:

[13] Mr. Sydney is currently 34 years old. In June 2008, he started dating Ms. Pamela Harris, now age 35, who is the victim of the assault and threats charge. Mr. Sydney and Ms. Harris have a 3-year-old son, William, and at the time of the preparation of the Pre-Sentence Report, it was reported that Mr. Sydney and Ms. Harris had an amicable relationship and that he saw his son on a regular basis. In the last few months, Mr. Sydney has commenced a relationship with another woman who has 2 children, aged 7 and 4, from a previous relationship. Mr. Sydney reported that their relationship is quite positive and that their relationship has progressed to the point where they would like to reside together.

[14] During his formative years, Mr. Sydney reported that he suffered physical abuse at the hands of his father and was placed in various foster homes between age 11 and age 16. His sister confirmed the difficulties of his childhood and that

Mr. Sydney has anger management issues which may have originated from their father, who also had anger management issues.

[15] Mr. Sydney had been working as a chef for a number of years and at the time of the submissions, he was working with a chef at a new restaurant under the Nova Scotia Community College's "red seal" program. As a chef, he was required to work at the restaurants on the weekends, and Defence counsel noted that if he was to be ordered to serve a jail sentence, even on an intermittent basis, he would likely lose his job. He was now paid a salary of \$13 per hour and from that, he was voluntarily providing some financial assistance to Ms. Harris to help with expenses for his son. At the time of the submissions of counsel, there was no court order for custody, access or child support for his son.

[16] Mr. Sydney has a prior, related criminal record. On June 4, 2009, he was granted a 9 month conditional discharge for an assault contrary to section 266(b) of the **Code** which occurred between December 22, 2007 and March 22, 2008. It is not clear from the Pre-sentence report or the JEIN Offender Summary Report whether this assault charge involved a common-law partner. However, on September 11, 2009, it is clear that he was sentenced for 2 offences - a spousal assault contrary to section 266 of the **Code** which involved Ms. Harris and a breach of probation contrary to section 733.1(1)(a) of the **Code**. For these subsequent offences, which occurred between July 12, 2009 and September 8, 2009, Mr. Sydney was ordered to serve a conditional sentence order of 4 months followed by a period of probation of one year. Mr. Sydney was subject to the terms of that probation order, at the time of the current offences.

[17] Since October 2010, Mr. Sydney has been subject to the terms and conditions of a Recognizance under which he was released on bail and required to observe a curfew as well as other conditions. There had been no breaches of that Recognizance between October 25, 2010 and September 7, 2012.

VICTIM IMPACT:

[18] Ms. Harris completed a victim impact statement on September 6, 2012. In it, she reports bruising on her neck and stress related symptoms, such as gaining weight, hair loss and feelings of anxiety and fatigue as a result of worrying for her safety and that of her family. She missed some days at work, has attended counseling sessions through her employee assistance program and is concerned that she will be harassed by Mr. Sydney. At the same time, Ms. Harris expresses psychological concerns for financial security, loneliness and avoidance by friends as a result of the breakdown of her relationship with Mr. Sydney.

[19] During the sentencing submissions, I noted that the Victim Impact Statement contained remarks which indicated a significant discrepancy from the remarks attributed to her in the Pre-Sentence Report. In the Pre-Sentence report which was prepared on August 23, 2012, the probation officer stated that Ms. Harris had indicated that she still has contact with Mr. Sydney and that they were getting along well in the interests of their son. Ms. Harris was noted to have said that she did not feel Mr. Sydney was a threat to her and therefore did not believe that there was any need for a no contact condition to be ordered by the court at this time. However, Ms. Harris' position with respect to any ongoing direct or indirect contact and communication with Mr. Sydney has now been clarified following the receipt of her Victim Impact Statement and the recent Family Court proceedings.

AGGRAVATING AND MITIGATING FACTORS:

[20] In the Crown's submission, a term of imprisonment is the fit and proper sentence given the aggravating factors which are present in this case. The Crown Attorney submits that the court should emphasize specific and general deterrence, denunciation of the unlawful conduct and the statutory aggravating factor contained in section 718.2(a)(ii) of the **Code**, that is, that there was evidence that the offender, in committing the offence, abused his common-law partner. The Crown also points to the aggravating factors that Mr. Sydney had committed 2 prior assaults and that at least one of them involved Ms. Harris. In terms of that spousal assault, Mr. Sydney was sentenced on September 11, 2009 to a conditional sentence order of 4 months, followed by a period of one year on probation. Furthermore, the Crown says that it is an aggravating factor that, at the time of this incident, Mr. Sydney was subject to the terms of a probation order which required him to stay away from the residence of Ms. Harris.

[21] Defence counsel, in her submissions, acknowledges that her client's actions represent a loss of self-control and completely unacceptable behavior. In terms of mitigating factors, counsel submits that the court should note that her client accepts full responsibility for his actions, entered an early guilty plea, is remorseful, wishes to apologize to Ms. Harris and has made numerous positive changes in his life. Since the incident, he has stopped drinking alcohol and completed the "New Start" program with respect to anger management, particularly within intimate relationships. Mr. Sydney has been subject to and fully complied with a curfew in a Recognizance for approximately 2 years which required him to be in his residence between the hours of 10 PM and 6 AM subject to limited exceptions. Furthermore, Defence counsel submits that Mr. Sydney's ability to comply with

the terms of his Recognizance for that period of time demonstrates that he has the ability to comply with terms and conditions of a conditional sentence order.

[22] Defence counsel submits that the primary purposes and principles of sentencing under section 718, 718.1 and 718.2 of the **Code** which are relevant in this case should have an equal focus on specific and general deterrence as well as rehabilitation of the offender and promoting a sense of responsibility in addition to acknowledging the harm done to the victim. Counsel also submits that the 2 days her client served on remand had a salutary effect and that Mr. Sydney should not be ordered to serve a sentence in jail, since a less restrictive sanction would be appropriate in all of the circumstances of this case.

[23] In terms of promoting a sense of responsibility, Counsel stated that Mr. Sydney had recently obtained a position as a chef and that he was in the “Red Seal” Program, an apprenticeship program through the Nova Scotia Community College. In that program, he would be eligible to earn a Certificate of Apprenticeship if he continued to work with the head chef at that restaurant. Defence counsel stated that her client has now lost the job that he had at the time of the submissions of counsel due to the imposition of the intermittent sentence on September 13, 2012. However, if the court was to order a conditional sentence of imprisonment, Mr. Sydney has lined up another job as a chef and therefore, his ability to pay child support to Ms. Harris for their son would not be affected.

IMPACT OF RECENT DEVELOPMENTS ON SENTENCING:

[24] The first issue which arises from the recent imposition of the 30 day intermittent sentence for the breach of the curfew condition contained in the Recognizance made on October 25, 2010, is whether that additional fact should be

taken into account in this sentencing decision. In this regard, section 725(1) of the **Criminal Code** permits the sentencing court to consider other offences for which the defendant has already been found guilty or with consent of the prosecution and the defence, to consider other offences to which the offender consents to plead guilty and to pass sentence for those offences.

[25] In **R. v. Angelillo**, 2006 SCC 55 (CanLii), the Supreme Court of Canada examined section 725(1) of the **Code** with regard to new charges which were alleged to have been committed while the offender was awaiting the sentencing decision, but which came to light after the accused was sentenced on the other charges of a similar nature. Charron J. points out in para. 24 that there are many provisions of the **Criminal Code** under which evidence that is capable of showing that the offender has committed another offence can be admitted at a sentencing hearing. For example, there is section 721(3)(b) of the **Code** which provides that, unless otherwise specified by the court, any Pre-Sentence Report must contain the history of prior convictions.

[26] In **Angelillo**, *supra*, Justice Charron concludes in para. 24 that there is no doubt that the court may take prior convictions into account in determining the appropriate sentence. In doing so, the court must not punish the offender again for that other offence. The fundamental principle of proportionality requires that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender; a prior conviction cannot, therefore, justify a disproportionate sentence.

[27] Madam Justice Charron also points out in paragraph 32 of **Angelillo**, *supra*, that the sentencing court must be careful in considering extrinsic facts from other

concluded or uncharged offences to ensure that the court is considering those facts for the purpose of establishing the offender's character and reputation or risk of reoffending for the purpose of determining the appropriate sentence for the offence of which he or she has been convicted. In providing a practical example of how this extrinsic evidence may be considered, it is interesting to note that Justice Charron utilized the example of a man who has assaulted his spouse and that extrinsic evidence may be adduced at the sentencing hearing by the party who seeks to rely on the relevant fact to demonstrate that the act was either an isolated incident or that the person was a violent offender.

[28] If this extrinsic evidence relates to an uncharged incident that has not been determined by the court, Charron J. states that if the extrinsic evidence is contested, the prosecution must prove it beyond a reasonable doubt (See s. 724(3)(e) **Code**). In addition, the sentencing judge must exclude otherwise relevant evidence if its prejudicial effect outweighs its probative value such that the offender's right to a fair trial is jeopardized: See **Angelillo**, *supra*, at para.32.

[29] As a result, I am satisfied that Mr. Sydney's subsequent conviction and sentence under section 145(3) of the **Code** for the breach of the curfew condition contained in his Recognizance, which occurred after submissions in this case, but before my sentencing decision, is properly before me.

[30] As Charron J. pointed out in **Angelillo**, I must consider the subsequent s. 145(3) **Code** conviction in determining the offender's character and reputation, his ability to potentially comply with the terms of a conditional sentence order if I was to impose one as well as his risk of reoffending for the purpose of determining the appropriate sentence for the offences before the court today. Again, it is important

to note that the sentence ordered today must be proportionate to the gravity of those offences and Mr. Sydney's degree of responsibility.

[31] A second issue which arises as a result of these recent developments is the potential impact of the prior 30 day intermittent sentence on the possibility of the court ordering a conditional sentence order. This issue relates to the interpretation and context of ordering intermittent sentences under section 732 of the **Code** and whether or not a subsequent conditional sentence order has the effect of collapsing an intermittent sentence into a straight time period of incarceration in a custodial facility. This issue was addressed in the case of **R. v. Middleton**, 2009 SCC 21 (CanLii) where the court held that imposing a conditional sentence of more than 90 days cannot render illegal the unexpired intermittent sentence imposed on the same offender for a different offence. The Court also noted that it is irrelevant whether the sentence to be served on an intermittent basis preceded or followed the conditional sentence order. Since each type of sentence has its own specific purpose, intermittent and conditional sentences can be effectively combined to take advantage of their complementary purposes: see **Middleton**, *supra*, para's 45-53.

[32] After having considered the **Middleton** decision, *supra*, I am satisfied that one of the sentencing options that is still available is the imposition of a conditional sentence order to be served in the community when Mr. Sydney is not serving his intermittent sentence of imprisonment. However, I also note that if I were to order an intermittent sentence, it would have to be combined with the 30 day sentence for the s.145 (3) **Criminal Code** which was made on September 13, 2012. If the combined sentence exceeded the 90 day limit imposed by Parliament in section 732(1) of the **Code**, that aggregate sentence would be collapsed to a sentence to be served on a straight time basis.

ANALYSIS:

[33] At the outset of my analysis to determine a fit and proper sentence in the context of a spousal assault, it bears noting that domestic violence is a serious matter and, generally speaking, a sentence for a spousal assault must impress upon the offender and others that specific and general deterrence as well as denunciation of this unlawful conduct must be the paramount considerations.

[34] As pointed out by the Ontario Court of Appeal in **R. v. Inwood**, [1989] O.J. No. 428 (OCA), “domestic assaults are not private matters, and spouses are entitled to protection from violence, just as much as strangers. This does not mean that in every instance of domestic violence a custodial term should be imposed, but that it should be normal where significant bodily harm has been inflicted, in order to repudiate and denounce such conduct.”

[35] In **R. v. Bates** (2000), 146 CCC (3rd) 321 (Ont. C.A.), the Court observed that the principles they expressed in **Inwood** remained equally applicable at that time and that courts have repeatedly recognized that offences of domestic violence are rarely isolated incidents. The victim is often subjected not only to continuing abuse, both physical and emotional, but also experiences perpetual fear of the offender. In fact, the principles established in those decisions are now statutorily recognized in section 718.2(a)(ii) of the **Criminal Code**.

[36] Of course, in any sentencing decision, other sentencing principles require the court imposing a sentence to also take into account any relevant aggravating or mitigating circumstances relating to the offence or to the offender: see section

718.2(a) of the **Code**. In this case, I find that there are several aggravating factors to consider:

- a) Mr. Sydney assaulted his common-law partner in her home;
- b) The assault was committed in the presence of their 3-year-old child;
- c) Mr. Sydney has a recent and related conviction for spousal assault involving Ms. Harris;
- d) At the time of the assault, Mr. Sydney was subject to terms of a probation order which prohibited him from going to the residence of Ms. Harris; and
- e) The statutory aggravating factors of abuse of a common-law partner and abuse of a position of trust in relation to the victim found in section 718.2(a) (ii) and (iii) of the **Criminal Code**.

[37] I also find that there are several mitigating factors to consider:

- a) Mr. Sydney entered an early guilty plea;
- b) He recognized the effect that his misuse of alcohol had on his conduct and has taken steps on his own to stop drinking alcohol altogether;
- c) Mr. Sydney has taken and completed the “New Start” program for anger management in the context of domestic relationships;

- d) He has accepted full responsibility for the offence, is remorseful and wishes to apologize to Ms. Harris for his completely unacceptable behavior;
- e) He has been steadily employed over the years and has recently taken steps to earn an apprenticeship certificate as a chef and has provided child support to Ms. Harris on a voluntary basis;
- f) Mr. Sydney has been under restrictive terms of a Recognizance since October 25, 2010 which required him to remain in his residence subject to a curfew between the hours of 10 PM and 6 AM, 7 days a week, subject to very limited exceptions. There were no breaches of that Recognizance known to counsel at the time of the submissions of counsel, however, on September 13, 2012, Mr. Sydney pled guilty to breaching the curfew condition on September 7, 2012;
- g) The presentence report was generally positive and noted Mr. Sydney's troubled upbringing, suffering physical abuse at the hands of his father and being placed in several foster homes.

[38] In all sentencing decisions, determining a fit and proper sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the particular circumstances of the specific offender. On this point, the Supreme Court of Canada stated, in **R. v. M. (C.A.)**, [1996] 1 SCR 500 at paras. 91 and 92, that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and

the gravity of the offence while at the same time taking into account the victim or victims and the needs and current conditions in the community.

[39] I agree with both counsel that denunciation of the unlawful conduct and specific and general deterrence are important purposes and principles of sentencing in section 718 of the **Code** which must be considered in the context of domestic violence. In this case, given the circumstances of the offence and this particular offender, I find that my decision must also focus on sentencing purposes and principles which are focused on rehabilitating Mr. Sydney, promoting a sense of responsibility in him and acknowledging the harm done to the victim.

[40] In the sentencing decision, it is also important for the court to consider the fundamental principle in sentencing expressed in section 718.1 of the Code which reminds judges that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In this case, given the nature of the assault and injuries suffered by Ms. Harris, I find that the gravity of the offence is toward the lower end of a continuum of assaults. There was no evidence in this case that the assault was a prolonged attack, nor was there any evidence that the assault caused any significant or long-standing physical injuries to the victim. Furthermore, I have no evidence that this assault was one incident in a pattern of abuse of Ms. Harris which continued over an extended period of time.

[41] In looking at other principles and purposes of sentencing found in section 718.2 of the **Code**, I am also required to consider all available sanctions other than imprisonment that are reasonable in the circumstances and not to deprive the offender of his liberty if a less restrictive sanction is appropriate in all the circumstances of the case.

[42] Defence counsel has submitted that it would be appropriate to order Mr. Sydney to be subject to the terms of a conditional sentence order. In **R. v. Proulx**, [2000] 1 SCR 61, Chief Justice Lamer said at paragraph 102 that incarceration will usually provide more denunciation than a conditional sentence, but a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances. The Chief Justice also expressed similar remarks with respect to issue of deterrence and conditional sentence orders: see **Proulx**, *supra*, at para.107.

[43] Pursuant to section 742.1 of the **Criminal Code**, the court must first conclude that a conditional sentence order is an available sanction, and if so, then the court must go on to consider whether it is an appropriate sanction. This latter consideration requires the court to be satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purposes and principles of sentencing set out in section 718 to 718.2 of the **Code**.

[44] In this case, I find that a conditional sentence order is an available sanction which may be imposed by the court under section 742.1 of the **Criminal Code** as there is no maximum term of imprisonment or minimum term of imprisonment which would preclude the court from making a conditional sentence order of imprisonment to be served in the community. Furthermore, I conclude that a conditional sentence order is an available sanction since I find that an appropriate sentence, in all the circumstances of this case, would not result in a federal term of

incarceration, but at the same time, it would not be a fit and proper sentence to suspend passing sentence and order Mr. Sydney to serve a period on probation.

[45] Having considered all of the purposes and principles of sentencing that ought to be considered in all of the circumstances of this case and also considering all of the aggravating and mitigating factors that are present in this case, I find that a conditional sentence of imprisonment provides a significant amount of denunciation and with the terms and conditions to be imposed, will also provide a significant level of specific and general deterrence. Put another way, I am not satisfied that, after having considered all of the circumstances of the offence and the specific offender, that specific deterrence of Mr. Sydney and denunciation of his unlawful conduct requires his separation from society through incarceration in a custodial facility. As such, I find that a conditional sentence order, in all the circumstances of this case, is consistent with the fundamental purposes and principles of sentencing set out in section 718 to 718.2 of the **Code**.

[46] Once the court concludes that a conditional sentence order would be consistent with the fundamental purpose and principles of sentencing, then the court must also determine whether it would be appropriate to serve the sentence in the community and whether it would endanger the safety of the community. In **Proulx**, *supra*, the Supreme Court of Canada concluded that this issue would require an analysis of the risk of reoffending and the gravity of the damage that could ensue should the offender re-offend, including the risk of economic harm. This analysis must be done on a case-by-case basis, but relevant factors would include the nature and circumstances of the offence, the relationship of the accused to the victim, the personal circumstances of the offender (including his or her prior criminal record, mental state and family situation), the conduct of the offender

following the commission of the offence and the danger that the offender might pose in the community: See **Angelillo**, *supra*, at para. 35.

[47] Looking at those factors in assessing the issue of the safety of the community, these charges relate to an incident between Mr. Sydney and his former common-law partner, Ms. Harris. The common-law relationship between Mr. Sydney and Ms. Harris has ended; they have not lived together for almost 2 years. Mr. Sydney had complied, without incident until a few days ago, with the term in the Recognizance not to have any direct or indirect communication with her, except as provided in that order. Mr. Sydney has recently become involved in a common-law relationship with another woman and the Recognizance was varied on September 11, 2012 to allow him to reside at her house. Mr. Sydney has successfully completed the “New Start” anger management program in the context of domestic violence and has stopped drinking alcohol, both of which played a significant role in the circumstances of the offences before the court.

[48] In considering the risk of Mr. Sydney re-offending or failing to comply with the court’s order, it has been pointed out that there was one prior breach of probation and that today’s sentence also includes a further breach of probation. I am satisfied that Mr. Sydney’s compliance with the restrictive terms of the Recognizance for a period of almost 2 years shows that he has the ability to fully comply with court orders. However, for some unknown reason, after almost 2 years of compliance with the restrictive terms of a curfew condition contained in his Recognizance, Mr. Sydney has admitted that he breached the curfew condition.

[49] As indicated above, I find that it is appropriate for me to consider the recent sentence for the curfew violation in the context of considering the offender’s

character and reputation as well as the risk of reoffending. The fact that the breach of the Recognizance occurred just before the court's sentencing decision in this matter, causes me to further reflect on the issue of whether Mr. Sydney has the motivation and ability to fully comply with a conditional sentence order. While I am concerned that Mr. Sydney has recently breached the terms of a court order, I do note that in breaching the terms of the Recognizance, Mr. Sydney's actions did not involve the commission of any other substantive criminal offences in relation to Ms. Harris or for that matter any other members of the community. Finally, I must remember that Mr. Sydney has been punished for that breach of the Recognizance and that today's sentencing decision must be proportionate to the gravity of the offence and the degree of responsibility of this offender and to not punish Mr. Sydney again for that other offence.

[50] During her submissions, Defence counsel stated that the 2 days that Mr. Sydney spent in custody until being released under the terms of the Recognizance had a salutary effect on him. Mr. Sydney had not been incarcerated prior to that time and I expect that the 2 days spent on remand did have a salutary effect. I am also satisfied that the intermittent sentence for the breach of the Recognizance will provide, as the Supreme Court of Canada phrased it in **Middleton**, *supra*, at para. 45, a balance between the denunciatory and deterrent functions of "real jail time" and the rehabilitative functions of preserving the offender's employment, family relationships and responsibilities and obligations to the community. Furthermore, I am satisfied that the recent imposition of the intermittent sentence will also have a salutary effect on Mr. Sydney.

[51] I find that all of these factors point favorably to my conclusion that the safety of the community would not be endangered by him serving the sentence of imprisonment in the community.

[52] Having concluded that a conditional sentence order to be served in the community is available and that it is also an appropriate disposition which is consistent with the fundamental purpose and principles of sentencing and would not endanger the safety of the community, I hereby order Mr. Sydney to be subject to a conditional sentence order of imprisonment in the community for a period of 8 months, with the 1st 4 months of that order to be served under terms of house arrest and the final 4 months being served under a curfew condition from 11:59 PM to 6 AM, 7 days per week, subject to certain exceptions. Following the 8 months conditional sentence order, Mr. Sydney will be subject to a probation order for the next 16 months.

[53] The eight-month conditional sentence order of imprisonment will be broken down as follows: 6 months on the assault charge, 2 months consecutive for the uttering threats charge and 2 months concurrent for the breach of the probation charge. The period of probation will attach to the assault and threats charge

[54] Mr. Sydney will be required to report to the sentence supervisor today and thereafter as directed by the sentence supervisor or probation officer. The conditional sentence order of imprisonment in the community will commence at 6 PM today.

[55] During the Conditional Sentence Order and the period of probation that follows, will also be subject to the statutory conditions keep the peace and be of

good behavior, appear before the court as and when required to do so by the court and notify the court, probation officer or supervisor, in advance, of any change of name, address, employment or occupation.

[56] While Mr. Sydney is on house arrest, he will be required to remain in his residence at all times, subject only to the following exceptions which allow him to be outside of his residence during that period would be as follows:

- a) when at regularly scheduled employment and traveling to and from that employment by direct route;
- b) when dealing with medical emergency or medical appointment involving him or a member of his household and traveling to and from it by direct route;
- c) when attending a scheduled appointment with your lawyer or probation officer and traveling to and from the appointment by a direct route;
- d) when attending court at a scheduled appearance or under subpoena and traveling to and from court by a direct route;
- e) when attending a counseling appointment, treatment program or meeting such as the Alcoholics Anonymous, at the direction of and with permission of your probation officer and traveling to and from that appointment program or meeting by a direct route;

- f) with the prior written approval of your sentence supervisor;
- g) for not more than 4 hours per week for the purpose of attending to your personal needs with the prior approval of the sentence supervisor;

[57] During the curfew period which requires you to remain in your residence between the hours of 11:59 PM and 6:00 AM the following day, 7 days per week, the only exception would be when you are dealing with a medical emergency involving you or member of your household and traveling to and from it by a direct route.

[58] Finally, you are required to prove compliance with the house arrest and curfew conditions by presenting yourself at the entrance to your residence should a sentence supervisor or a peace officer attend there to check compliance.

[59] During the conditional sentence order you are not to possess take or consume any alcohol or intoxicating substances and you are not to possess take or consume any controlled substances as defined in the Controlled Drugs and Substances Act except in accordance with a physician's prescription for you or a legal authorization;

[60] During both the Conditional Sentence Order and the Probation Order:

- a) You are not have possession of any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance;

b) You are not to have any direct or indirect contact or communication with Ms. Pamela Harris except through a lawyer or in accordance with the written separation agreement or court order for access to a child or children or where the contact is initiated by her and is subject to her express consent which may be withdrawn at any time;

c) You are not to be on or within 50 meters of the premises known as any residence or place of employment of Pamela Harris, except on those occasions as may be authorized by a court of competent jurisdiction for arranging for access to your son or Ms. Harris has contacted you or a 3rd party to make arrangements for access to your son;

d) You are to attend for substance abuse assessment and counseling as directed by the probation officer, assessment and counseling in anger management as directed by your probation officer and to attend for assessment and counseling for violence intervention and prevention program as directed by the probation officer and in particular the spousal or partner related program. Finally, you are to attend for assessment, counseling or any program as directed by the probation officer and participate in and cooperate with any assessment, counseling or any program that may be directed by the probation officer.

[61] In addition to the foregoing orders, there will also be a section 110 **Criminal Code** order prohibiting you from possessing any firearms, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosives substance, for a period of 5 years.

[62] I am also making an order under section 487.051 of the **Criminal Code** which will require you to provide a sample of your DNA.

[63] Finally, given the fact that you have recently started a new job and have just lost that employment, you are paying child support to Ms. Harris and will, in all likelihood, be assisting your current partner with her household expenses, I find that it would be an undue hardship to impose the victim fine surcharge in the circumstances of this case. As such, I will waive the imposition of the Victim Fine Surcharge on all of the charges that were before the court today for sentencing.