

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Basso*, 2020 NSPC 16

Date: 2020-01-31

Docket: 8215859 - 8215861

Registry: Halifax

Between:

Her Majesty the Queen

v.

Laurence Gary Basso

DECISION ON SENTENCING

Judge:

The Honourable Judge Laurel Halfpenny MacQuarrie

Trial Heard:

November 26 & 27, 2018; December 5 & 6, 2018; January 4, 15, 24 & 25, 2019 and February 8 & 27, 2019 in Halifax, Nova Scotia

Decision:

June 12, 2019

Sentencing Decision:

January 31, 2020

Charges:

Section 267(b) of the *Criminal Code of Canada*

Counsel:

Sylvia C. Domaradzki, for the Crown
James Giacomantonio, for the Defence

By the Court:

[1] After a lengthy trial, Laurence Gary Basso, was found guilty on June 12, 2019 that he did:

On or about February 25, 2018, at or near Halifax, Nova Scotia, in committing an assault upon Joseph Jean Marc Patrice Simard cause bodily harm to him contrary to section 267(b) of the *Criminal Code*.

[2] This was proceeded by way of indictable offence by the Crown.

[3] He was found not guilty of a charge contrary to s. 140(1)(b) of the *Criminal Code* and a breach of trust charge was dismissed after a motion for a directed verdict.

[4] This Court heard sentencing submissions from counsel on November 22, 2019.

[5] The purposes and principles of sentencing are set out at s. 718, 718.1 and 718.2 of the *Criminal Code* as follows:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance

of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community...

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

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing...
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
 - (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation, ...

shall be deemed to be aggravating circumstances;

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; ...
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[6] The Crown is seeking a period of incarceration of 6 to 9 months along with a s. 109 firearms prohibition and a primary DNA order.

[7] Mr. Giacomantonio advocates for a conditional discharge with a period of probation and a s. 113(1)(b) firearms order.

[8] Section 730(1) of the *Criminal Code* states:

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

[9] Where a Court directs a discharge, the offender shall be deemed not to have been convicted of the offence.

[10] In addition to their oral submissions, counsel provided thorough sentencing briefs to the Court.

[11] Mr. Giacomantonio filed a package of employment documents and reference letters and after “discussions” between himself and the Crown, a revised package was received and is now an exhibit. The first package does not form part of the Court record nor the Court’s decision. A portion of the original package has never, at counsel’s request, even been seen by myself.

[12] There was also an “Agreed Statement of Facts on Sentencing” regarding two sustained disciplinary allegations against Mr. Basso under the *Nova Scotia Police Act*. The Court received a pre-sentence report (PSR) and a victim impact statement from Mr. Simard.

[13] Mr. Basso’s PSR provides the following information, and I paraphrase:

Laurence Gary Basso was born September 23, 1980 and is currently 39 years of age... He was raised in Dominion, Nova Scotia, and since November 2018 resides in Glace Bay where he owns a landscaping business. He has owned this business since 2015.

His mother, stepfather and his wife were all interviewed for the Report.

Kathleen MacCormick describes the offender as a ‘fine young man’...is outgoing, is well-liked...has a lot of friends...alcohol and illicit drugs have never been a concern...he is not quick tempered and she describes him more as a laid back person...the offender was never a problem to her and her husband...never had any concerns about his friends...he enjoys good relations with all the family and is very close to his siblings...he always wanted to be a police officer. She informs he dropped out of university to pursue that dream....

His stepfather provides the following information. He says he has been in the offenders life since the offender was 2 years of age and describes him as a great son...a level headed person...exercises good judgement...and is not a bit violent...is an outgoing person who enjoys an active lifestyle... ‘you are not going to find a flaw in his character’.

Jenna Basso describes no history of abuse, substance abuse or violence in their relationship and describes him as a caring and compassionate person who thinks of others first...as a perfectionist...as a very sociable person and...very straight and narrow and always follows the rules no matter what he is doing... ‘he is the calmest person I have ever met’.

Between 2001 and 2004, he was employed as a police officer with the Calgary Police Service...since 2004 he has been employed as a police officer with the Halifax Regional Police Service...since 2015, he has been operating a private business, CapeScape Landscaping...

Sgt. Astephen, the offender’s supervisor, says the offender was one of his best officers and was a role model for younger officers.

Ms. Sherry Samson, friend of the offender...describes him as a work horse...as a motivated person with a positive attitude...dedicated to his job and is a stoic cop...a patient and respectful person...he does not have a quick temper, and is not a violent person. She adds, however, he can hold a grudge at times...is surprised as his actions are out of character for him...he is under a lot of stress...and it might be beneficial for him to see a counsellor.

Mr. Steven Wagg describes the offender as a meticulous worker who is very professional and one who has a strong work ethic.

Mr. Basso does not accept responsibility for committing the offence. He states he believes he was doing his job. Mr. Basso says any time an officer has to use force it is unfortunate but sometimes it is a necessity. He expressed his concern about the sentencing and his concern about his future as a police officer. He said he loves his job and always wanted to be a police officer.

Mr. Basso reports...he is under considerable stress due to his current situation...he has no addictions issues...has never consumed alcohol or any other illicit drugs...

Records of the Justice Enterprise Information Network (JEIN) show no previous record for the offender.

[14] I will say at this stage of the sentencing that Mr. Basso's non-acceptance of responsibility for committing the offence is not a consideration permitted nor considered on sentencing.

[15] I am now going to summarize the employment documents and reference letters filed. I have read them in their entirety and the 21 of them from cover to cover. The excerpts that I am going to read provide an overview of their cumulative contents.

Jean-Michel Blais, Chief of Police, Halifax Regional Police, letter dated May 13, 2015 to Detective Constable Gary Basso. Congratulations on your nomination as a finalist in the category of Investigator of the Year. Investigator of the Year is presented annually to an HRP officer who displays excellence in investigation.

Gary, you are a trusted colleague who consistently goes above the call of duty to conduct solid investigations.

January 14, 2014 – Letter of Recognition presented to Detective Constable Gary Basso. Halifax Regional Police had been seeking Brandon Mombourquette and Andrew Hutter as arrestable parties for many months. Many officers...including Cst. Basso, spent countless hours trying to apprehend these two offenders. D/Cst. Basso...put in a lot of time, on his own initiative in an attempt to locate and arrest these two people. Their dedication should be admired...efforts paid off without harm to the public resulting in an arrest of high profile offenders who posed a significant risk to the public safety in our community and elsewhere.

Signed by: S/Sgt. James Butler
Supt. Brenda Young

April 30, 2014 – Again from Jean Michel Blais, Chief of Police. D/Cst. Gary Basso...sending a letter of recognition signifying your nomination again for the 2014 Investigator of the Year award. It is an honour to be nominated by your peers and you should be very proud of this recognition.

There are several performance letters in this file that are very similar to those, commending Detective Gary Basso on his investigative abilities and techniques.

These were letters that were provided to Mr. Giacomantonio for the sentencing and

I am paraphrasing:

Sgt. Perry Astephen writes... Gary Basso is a high energy, competent officer that goes above and beyond regardless of his assignment. I have had the privilege of monitoring Gary Basso as he entered detective work and I would often take calls from him looking for investigative techniques and advice on how to continue investigations that many other officers would have simply written off and closed. Cst. Basso has a reputation as a hard worker and the tenacity matched only by a few. I am aware of Cst. Basso's current conviction before the Courts. I believe the interaction between him and the victim in the matter do not ultimately define Gary Basso as a police officer. I believe everyone is worthy of a second chance to prove themselves and Cst. Basso is no exception.

Det/Cst. Robbie Baird writes...I honestly would consider him one of the hardest working police officers I have ever known.

Further from Scott Boyd, who is a police officer with the Calgary Police Service for 20 plus years worked with Mr. Basso in that service between 2002 and 2004. I found him to be a young energetic officer who is eager to serve his community and make a difference in the lives of people he came across. I've pleased to have remained friends with Mr. Basso over the years. I continue to know him as a caring individual who takes great pride in his work.

Cst. Craig Conrad states...Gary is known as a proactive and hardworking police officer in Halifax.

Scott MacDonald writes, I confirm that I have known Gary Basso for about 14 years when he began his employ with Halifax Police. I have worked on shift with Mr. Basso and have been to calls for service with him where he has exercised great empathy with people, regardless of their station in life or particular circumstances.

Constable Geoff McNamara, Halifax Regional Police, writes, Gary is a respectful person and hardworking Officer, who was always willing to help me out or provide guidance as Senior Officer to aid my investigations. He was a leader on the shift and I would gladly work beside him any day.

And the last one I will refer to is from Detective Constable Pat O'Neil, Criminal Investigative Division, who states, my opinion was that he is a hardworking, very competent and a natural police officer. I was lucky to work with him.

[16] The Agreed Statement of Facts was filed with the Court:

For purposes of the present criminal sentencing proceedings in relation to charges under section 267 of the Criminal Code only, for the purpose of dispensing with proof thereof, the Lawrence Gary Basso admits the following as facts:

1. Allegation was filed on August 28, 2008. On May 13, 2009, charges of acting in a disorderly manner or in a manner that is reasonably likely to bring discredit on the reputation of the Police Department was sustained.
2. The facts underlying that allegation were that between February and August 2008, Gary Basso met and engaged in an intimate relationship with a person who he met in the context of police duties – while checking on a curfew condition of someone related to this person. The relationship continued under the auspices of a professional relationship. This person was an associate to known criminals in the city of Halifax. The relationship ended when Gary

Basso was confronted with this allegation. The relationship occurred both off and on duty and their presence together was at times observed by the criminal element. Much of the contact occurred by electronic means via HRP issued equipment (cell phone).

3. That in 2015, there was another disciplinary investigation.

4. The charges that were sustained were under s. 24(1)(a) – acting in a disorderly manner or in a manner that is reasonably likely to bring discredit on the reputation of the Police Department and 24(3)(a) – neglecting to or, without adequate reason, failing to promptly, properly or diligently perform a duty as a member.

5. Facts underlying this allegation were that based on information obtained from a 3rd party, an individual was arrested for a drug offence. In anticipation of a CDSA warrant, the residence was secured. While waiting, drugs and a weapon, with ammunition, was located. As none of the information was ever corroborated, nor entered as property on Versadex (with the exception of the weapon) and no reports to justice were filed, this search was deemed to be illegal for further court proceedings. Cutting agent was also seized and during the course of the Police Act investigation, it was found that some part of this cutting agent was missing from the HRP police locker. It was given to a coded source by Gary Basso and, notwithstanding that he understood the protocols, this was not documented in any form.

6. This matter was referred to SiRT in May 2015. Mr. Basso was suspended on May 25, 2015. Criminal charges were laid and were subsequently stayed by the Crown in May 2017. On June 28, 2017, Mr. Basso was sanctioned under the Police Act and was given 10 days suspension of pay for providing property that was scheduled for destruction to a confidential informant in lieu of pay and failed to document according to policy.

[17] In support of his position for a conditional discharge, or at most a suspended sentence, Mr. Giacomantonio provided the Court with several cases.

1. **R. v. Baxter** [2018] O.J. No. 4634 (Ont. CJ)

This was a case of a police officer charged with assault causing bodily harm. The victim sustained a nasty gash on his face as a result of being taken to the ground. This victim was known to have mental health and substance abuse issues. The officer involved had no prior record, he had no record for discipline under the *Police Services Act*. He had several positive reference letters of support and the

Sergeant, who was the accused, filed psychiatric assessments regarding personal issues within his own life during the time of that offence.

2. **R v. Dunn** [1992] O.J. No. 685 / and at [1994] O.J. No. 279 (ONCA)

Police officer again was charged with assault causing bodily harm and he received a conditional discharge. The officer had asked the victim for identification while the person was standing in front of this own home for no apparent reason. The victim walked towards his house, the police officer grabbed the victim's wrist, took him back to the police vehicle, leaned him up against it and the officer punched him in the eye. The victim then bit the police officer and the police officer punched him and took him to the ground. The police officer made racial slurs to the victim. The sentence on appeal was upheld. Excessive use of force was established and this officer had an exemplary police record.

3. In the decision of **R. v. Kidd** [1998] O.J. No. 1739

This was a police officer who was charged with assault causing bodily harm and a conditional discharge was imposed. The police officer had stopped the victim and asked him to get out of his car and he was cuffed. The victim pushed a female officer and then the police officer that was charged struck the victim in the face with a fist and he received an eye injury. The officer resigned as a 20-year member of the police service. He had an unblemished police service record. It was confirmed on sentencing there were no implications regarding his future career as a police officer.

4. **R. v. Rice** [2015] O.J. No. 3397 (ONCA)

Police officer in this case hit a person with an open palm and then kicked him. Excessive use of force was found to be made out by the Crown as regard to kicks. A conditional discharge was granted. This was a common assault case, not assault causing bodily harm.

5. **R. v. Shipley** [2015] B.C.J. No. 2201 (BCPC)

Police officer charged with common assault. The officer struggled with the victim's arm and kneed him three times. A discharge was entered. This officer had a good employment record with no issues and excellent letters of reference.

6. **R. v. Sweet** [2007] BCPC No. 1747

Police officer charged in this case with assault causing bodily harm. He kicked a victim when he was laying handcuffed on the ground. There was a laceration to the victim's face. The kicking was not recorded in the police officer's notes. A conditional discharge was entered. A plea of guilty was entered immediately. This person had great police record and had taken some personal counselling.

7. **R. v. Walker** [2006] O.J. No. 2840 (Ont SCJ)

Police officer charged again with assault causing bodily harm in Ontario. The victim had resisted arrest and the police officer took him to the ground. He sustained a broken cheekbone. There was a conditional discharge granted but the Court did not supply any reason. All I have is the Court of Appeal decision saying it was within the trial Judge's discretion.

1. Mr. Giacomantonio also referred to **R. v. Ens** and **R. v. Moyse** 2011 M.J. No. 408

Two police officers charged there, punched a victim. They were both charged with common assault under section 266. Constable Moyse had an outstanding 7-year distinguished service record with the RCMP, he received 4 months imprisonment. Constable Ens had a similar record with evidence that he would lose his job if convicted and he received a conditional sentence order.

2. **R. v. Gorman** [2009] N.S.J. No. 604

Constable Gorman was a member of the RCM Police. He was charged with two counts of theft under \$5,000.00. He entered guilty pleas to both and received a suspended sentence and a term of probation.

3. **R. v. Douglas Holmes** [2019] O.J. No. 906 (Ont. CJ)

Police officer charged with assault causing bodily harm. There was excessive use of force in an arrest causing a broken shoulder to the victim. The Crown was seeking a suspended sentence with probation. Defence was seeking conditional discharge. Severe employment consequences were known to the court. This officer had an unblemished record as a police officer. The totality of the facts were avoidable by the police officer. A suspended sentence with probation was ordered.

4. **R. v. Mathieu** [2011] O.J. No. 6356

During an arrest for public intoxication, the victim was put in cells and was struck by the officer which resulted in a broken nose. He had an exemplary career. He entered a plea of guilty and he received a suspended sentence and two years probation.

5. **R. v. Tait** [2005] BCJ No. 1574

Police officer, assault causing bodily was the charge. There was a fractured jaw sustained by the victim which required surgery. The officer had an exemplary record of 10 years service. A discharge was determined not to be appropriate and a suspended sentence with probation was ordered.

6. **R. v. Bal** [2013] B.C.J. No. 237

Police officer charged with a common assault. There was a guilty plea. The police officer had initiated his own rehabilitation through counselling prior to sentencing. Was fully cooperative with the investigation. A conditional sentence was not appropriate and a suspended sentence with probation was ordered.

7. **R. v. Lofroth** [2016] B.C.J. No. 2764

Police officer entered a plea of guilty to a common assault. He received a suspended sentence and probation. He had had a prior discharge for assault of a prisoner in lock-up.

8. **R. v. Othen**, 2018 ABPC 38

This was a decision that was used during the motion for a directed verdict by Mr. Giacomantonio in the trial proper. In that case, the victim was stopped by police and he ran and he hid. An officer pulled out his weapon, told him to stop and get on the ground which he did. Another officer, being Cst. Othen, ran at the victim, landed on him and began beating him and was joined by two other officers. Cst. Othen then dug into the victim's neck with a key. He was transported to hospital and was assessed to have multiple fractured ribs, collapsed lung and a laceration on his lip. The force used by Cst. Othen was determined to be excessive, unnecessary and disproportionate to what the circumstances dictated. He was convicted of assault causing bodily harm and though we do not have the sentencing decision Mr. Giacomantonio contacted counsel for the officer and was advised he received a period of 90 days in custody and probation.

The Crown referred to several cases as well.

1. **R. v. Kelly**, 2015 N.J. No. 111

Police officer with RCMP. While on duty, he made an indecent phone call to a female and then made a false statement to divert suspicion from himself with intention to mislead police in the investigation. The officer received 10 months imposed with probation and a statement that a conditional sentence order was not appropriate. The Judge held that a significant public trust was breached by both the indecent call and the subsequent act to divert suspicion and both were viewed as aggravating. This RCMP officer had a very favourable police record of service.

2. **R. v. Gillan**, 2009 BCPC 241

Police officer charged with common assault under and a 21 day conditional sentence order was imposed.

[18] The Crown, in her written submissions, referred to three recent Nova Scotia cases involving police officers and their sentences:

In Nova Scotia, a Halifax Regional Police officer was sentenced for a theft that he committed while on duty as a police officer. Calling the actions of Anthony Sparks ‘an egregious breach of trust by a police officer against a member of the public he was sworn to serve and protect.’ Judge A. Murphy sentenced Mr. Sparks to a 9-month Conditional Sentence (CSO). Similarly, another Halifax police officer, George Farmer, was found guilty of voyeurism and breach of trust charges. He was sentenced to a 6-month CSO.

[19] The Crown also referred to **R. v. Burnett**, a 2019 decision of Justice Chipman, of the Nova Scotia Supreme Court 2019 NSCC 212, where a police officer received a 10-year jail term. Her comments in regard to that matter were simply to suggest that Courts are providing “a message” to police officers that jail is a reality when they step outside the bounds of the law.

[20] The Crown refers to three decisions where non-police officers were convicted of assault causing bodily harm and their respective sentences.

R. v. Hall, 1998 CanLII 1247 (NSCA)

The accused had a very lengthy criminal record. He was charged with assault causing bodily harm. The harm included abrasions, bruises and a broken nose and a 9-month conditional sentence order was imposed.

R. v. Gannon, 2015 NSPC 97

Again, accused was charged with assault causing bodily harm where the victim received fractures to the facial bones and a concussion and a 12-month CSO was imposed.

R. v. Chickness, 2011 NSSC 225 (CanLII)

Mr. Chickness was charged with assault causing bodily harm where the victim received a cut from a knife along his jawbone. This individual had a substantive prior criminal record and he received a 21-month conditional sentence order

[21] I think it is important at this point to make some comment on the findings that I made at trial:

[144] There is no dispute Cst. Basso struck Mr. Simard in the face. What is at issue are the circumstances which led to the same and was this contact with Mr. Simard justifiable pursuant to section 25 of the *Criminal Code* (*supra*)....

[168] Cst. Basso wants the Court to believe he was justified in using the force he did. Mr. Simard punched him in the leg, he saw that, he was concerned he would come toward him again, perhaps take his legs out from under him and also because he did not know if Mr. Simard had a weapon on him. The latter comment from Cst. Basso strikes me as odd given he turned his back to Mr. Simard to grab his backpack, but leaving that aside, I cannot, because of the significant inaccuracies and omissions in his notes and reports, accept his evidence that Mr. Simard punched him in the leg, nor that he perceived Mr. Simard was going to continue, nor perhaps grab the officer's legs.

[169] At the most, Mr. Simard was leaning toward Cst. Basso to get a bag that Cst. Basso was clearly in control of and moving from side to side in front of Mr. Simard. It looked like a game of fetch to this Court. If it was Cst. Basso's intention to give Mr. Simard his backpack, why move it away? Mr. Simard's evidence that upon watching the video, he felt he was trying to retrieve his bag is logical and supported by the movements in the video and I accept that is what he did and he never punched Cst. Basso, nor make any movement toward him of an assaultive nature.

[170] I reject Cst. Basso's evidence that Mr. Simard punched him in the leg. The inconsistencies and omissions cause me great concern as to his accurate recollection on the punch. But for the video, the scene painted by Cst. Basso stands in sharp comparison to what is seen in the MTP parking lot.

[174] Given the Court's finding there was no punch to the leg of Cst. Basso by Mr. Simard, clearly the resultant strike to Mr. Simard's face was an excessive use of force and does not fall within s. 25(1). It was neither proportionate nor reasonable nor necessary. For the same reasons, s. 34 does not provide a legal justification for Cst. Basso's strike to Mr. Simard.

[22] It is always an extremely difficult occasion when a Court is faced with sentencing a police officer. The Court receives evidence everyday from hard working and professional police officers and appreciates their role in the protection of the public, and that it is not always an easy job. It can at times be thankless, it can be lonely, but it can be rewarding. To have to sentence a police officer for an offence, and particularly one which occurred in the execution of his duties, is regrettable. It causes public confidence in policing to be called into question and it unfortunately can brush too broad a stroke on the profession in general.

[23] The purposes and principles of sentencing apply wholly to a police officer. There is nothing in law that precludes a police officer from receiving a s. 730 discharge, if the test as established in **R. v. Fallofield**, (1973), 13 C.C.C. (2d) 450 (BCCA) is met and reflects the purposes and principles of sentencing I have referred to.

[24] It is important to note also that a conditional sentence order is not available in law to Mr. Basso.

[25] Much guidance is given by other courts which have sentenced similar offenders in similar circumstances.

[26] In *Burnett*, (*supra*), Justice Chipman refers to the following at paragraph 20 on the issue of parity:

In *R. v. Lacasse*, 2015 SCC 64 (S.C.C.), Justice Wagner (as he then was), noted at para. 54:

54 The determination of whether a sentence is fit also requires that the sentencing objectives set on in s. 718 of the Criminal Code and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This Court explained this as follows in *M. (C.A.)*:

It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime...Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]

[27] The Nova Scotia Court of Appeal, in the well-known and oft-cited decision in **R. v. Cusack** [1978] N.S.J. No. 538, involved a Halifax Regional Police officer who stole \$425 dollars from a motorist he stopped. Cst. Cusack received a 9-month sentence. Justice Hart provides commentary regarding police misconduct that result in criminal convictions. It has been cited with approval in this jurisdiction since, as well as across Canada.

[28] In particular, from paragraphs 14 and 15, and I paraphrase:

In my opinion the paramount consideration in this case is the protection of the public from offences of this sort being committed by persons who are given special authority by our law to deal with individual members of society and to

deter such persons from acting in breach of their trust. All citizens must have confidence that police officers who are vested with substantial rights of interference with individual liberties exercise these rights with scrupulous propriety and that any failure to so act will result not only in dismissal from the position of trust but also in the imposition of substantial punishment.

The commission of offences by police officers has been considered on numerous occasions by the courts, and the unanimous finding has been that their sentence should be more severe than that of an ordinary person who commits the same crime because of the public trust which they held at the time of the offence and their knowledge of the consequences of its perpetration. In *R. v. Auger* (1972), 5 N.S.R. (2d) 151...at p. 160, MacKinnon C.J.N.S. said:

‘The appellant at the time of the offence was a member of the Halifax City Police, and had been such for fifteen years. It is true that at the time the offence was committed he was on vacation, but he was still a trusted public servant whose duty it was to maintain law, and he violated that trust. In such a situation the aspect of deterrence should be considered as very important in assuring the protection of the public. I believe that this was the principal factor considered by the trial judge in imposing sentence.’

[29] And further at paragraph 20:

In *R. v. McClure* (1957), 26 C.R. 230,...Adamson C.J.M., in delivering the judgment of the Manitoba Court of Appeal said at p. 237:

“...The accused was a member of the Winnipeg police force and used information he acquired in that office to commit the offence. He had taken an oath of office to ‘treat as confidential the official business of the department,’ ‘nor shall he impart information relating to the official business of the department’. He admitted on cross-examination that he did not have very much regard for the oath. Policemen are in positions of trust. The administration of justice depends on the fidelity and honesty of the police....”

[30] And finally, at paragraph 21:

See also *R. v. Shaw*, *R. v. Glass* (1968), 66 W.W.R. 626 (B.C.C.A.) and *R. v. Pretty* (1971), 2 N. & P.E.I.R. 10, 5 C.C.C. (2d) 332, where Nicholson J., when speaking for the Prince Edward Island Supreme Court of Criminal Appeal, said at p. 341:

‘The fact that the appellant, at the time he committed the offences, was a member of the Royal Canadian Mounted Police weighs heavily against him.... The appellant was a trained and experienced policeman who must have fully appreciated the enormity of his crime.’

[31] Any sentence that is imposed must take into consideration s. 718.1 in that it must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

In *R. v. Nasogaluak*, 2010 SCC 6 [2010] 1 S.C.R. 206, Lebel J. stated at paragraph 40 for a unanimous Court that a ‘sentence must respect the fundamental principle of proportionality’ ...He went on to expand on this at paragraph 42:

‘For one, it requires that a sentence not *exceed* what is just an appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limited or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the “just deserts” philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused (see *R. v. Cluney*, (2013) 338 Nfld & P.E.I.R. 57 (CA) paragraph 13)

[32] In **R. v. Cook** 2010 ONSC 5016, a decision of Justice Casey Hill of that Court, the following appears at paragraph 35:

Because police compliance with the rule of law is presumptive, when sentencing a police officer for a crime involving breach of the public trust the court may properly take into account that the accused would necessarily be well aware ‘of the consequences of its perpetration’....

[33] At paragraph 36:

Not surprisingly is the reality that individuals who find themselves before a criminal court convicted of a breach of trust crime are able to adduce abundant good character evidence – ‘ it is, of course, this very type of character profile

which allows an individual to attain a position of trust'... (as to police defendants, 'as would be expected, each appellant was of good character')....

[34] And further at paragraphs 37 - 38:

In any case involving conviction and sentence, the accused is stigmatized, more or less, by the process. While shame and disgrace may be amplified in the instance of a public official, these consequences are not to be over-emphasized in determining a fit punishment....

...General deterrence and denunciation drive the sentencing process in abuse of trust prosecutions. In the absence of an exceptional mitigating factor (e.g., addiction...), severe sentences are justified for police officer offenders to honour these sentencing principles.....

[35] And he continues finally at paragraphs 41 - 43:

A few words deserve to be said regarding two features of the sentencing of a police officer which impact on the severity of punishment – the consequential impacts of loss of employment, and, incarceration in protective custody.

...in the case of conviction for serious breach of trust in the course of duty, the 'act will result not only in dismissal from the position of trust but also in the imposition of substantial punishment'. While a police officer who breaches the public trust brings upon him or herself the consequences of dismissal, that penalty falls to be considered within the totality of the circumstances worthy of review by a sentencing court.... That said, the jeopardy of loss of employment on the part of a police officer cannot 'trump the pressing need for denunciation and deterrence'....

Because an inmate who is known to be, or discoverable as, a former police officer is at risk from general population prisoners, such an offender will almost inevitably serve much or all of the sentence in protective custody. This reality, involving as it does more limited social contact and institutional amenities, ordinarily warrants consideration in mitigation of punishment....

[36] The public is understandably concerned with any allegation of police misconduct because it undermines the bond that should exist between the citizen

and the police service. This essential bond is reflected in Sir Robert Peel's philosophy that the ideal model of policing is one where, 'the police are the public and the public are the police'. Any behaviour that undermines that bond is injurious to the public good. (see *R. v. Baxter, supra*, at para. 1)

[37] An essential element of the process of crafting a fit and proper sentence requires the court to keep in mind that every case must be decided on its own facts (see *R. v. Baxter, (supra)*, para. 27)

[38] *Fallofield, (supra)*, is the gold standard instruction for courts when determining a discharge, be it absolute or conditional. It confirms the sentencing objectives of denunciation and deterrence can be achieved through the imposition of a s. 730 discharge. The following is instructive:

From this review of the authorities and my own view of the meaning of s. 662.1, I draw the following conclusions, subject, of course, to what I have said above to the exercise of discretion.

- (1) The section may be used in respect of *any* offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
- (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
- (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interest of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interest of the accused, then that brings the next consideration into operation.

- (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
- (5) Generally, the first condition would presuppose the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
- (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
- (7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.
- (8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[39] *Fallofield* has been applied by all levels of courts in Nova Scotia, including the Court of Appeal decisions **R.v Dalton** [1977] N.S.J. No. 444 and **R. v. Doane** [1980] N.S.J. No. 494. Chief Justice MacKeigan, as he then was, delivered both decisions for the court. In *Doane*, (*supra*), referring to Judge Oxner's comment: 'So, I have no difficulty in finding that a discharge is in the best interest of Mr. Doane who may very well have to earn a living through occupations which requiring bonding', said: (para. 9):

We find it entirely speculative that a conviction might have the negative consequences for Mr. Doane to which the learned judge has referred. Here we can find no significant adverse repercussions which might arise from conviction, other than those incurred by any person convicted of any crime; certainly none which outweighs the injury to the public interest presumed to be caused whenever a

person violates a criminal statute and fails to be convicted, unless the particular offence is trivial, impulsive, harmless or otherwise inconsequential.

Chief Justice MacKeigan allowed the appeal and the conditional discharge was set aside and a fine was imposed.

[40] To impose a discharge the court, following the wording in section 730, and the judicial pronouncements upon that section, it must determine that such is in the best interest of Mr. Basso and such it is not contrary to the public interest.

[41] Determining whether or not it is in Mr. Basso's best interest is much more than simply Mr. Basso's desire not to have a conviction recorded against him. In his best interest, as outlined in *Fallofield*, *Doane* and *Dalton*, requires a significant adverse repercussion to fall to Mr. Basso should a conviction be recorded.

[42] There was a lengthy discussion when we were last in court in November on this issue, and in particular what employment implications a conviction will have on Mr. Basso as an HRP officer. The following exchange took place and I refer to the transcript which I have had prepared:

THE COURT: Do you have anything from HRP about the go forward for Mr. Basso?

MR. GIACOMANTONIO: ...The way that...the parallel...discipline process works is that it is held in abeyance-...

MR. GIACOMANTONIO: Some members of that process are here and they've been here throughout the court process. They observe and then they will use this...Your Honour's judgment to help guide their process....they won't commit to a position in advance and that's very reasonable of course.

THE COURT: Because when you look at **Fallofield**, and I know I've referred both of you before during our conversations somewhere on the issue of discharge, **Doane** and **Dalton** from the Nova Scotia Court of Appeal, it talks about significant adverse repercussion and I would have to say, this would probably be the first case that I've had an application for a discharge that I don't have something in writing to establish that...significant adverse repercussion.

[43] After some significant discussion between the Bench and counsel, and then counsel and Superintendent Colleen Kelly of HRP the following exchange took place:

MR. GIACOMANTONIO: And the agreement is all other things being equal on a specific officer or specific subject to a disciplinary process, the more significant...punitive consequence, so suspended sentence versus jail and custody versus suspended sentence, the more significant disciplinary outcome. So, it's called progressive disciplinary process and...the more significant consequence you give Cst. Basso, the more significant effect it has on his disciplinary process. And we are not saying that if he gets a discharge, he'll keep his job... And we are not saying that if he gets jail, he's gonna lose his job...those likelihoods are staggered. So, lower outcome, more likely he keeps his job; higher outcome less likely. That's it.

MS. DOMARADZKI: And just to make it clear, it is a more punitive consequence, more significant effect but Superintendent Kelly has made it clear, she doesn't have anything before her...she's not bias, she's going to keep an open mind and as such, at this time she cannot commit whether he will be dismissed or won't be dismissed because she hasn't heard the full story from their perspective. And obviously...she's going to be looking at what...Your Honour does but they have their own Act and their own policies that they have to go through.

[44] The sum total of those discussions is I do not know what repercussions, if any, will follow Mr. Basso post-sentencing in terms of his employment in terms of the application for a sentence of a discharge. Whether such will be significant, that is the loss of his employment as a police officer, I simply do not know.

[45] The other consideration, is whether the accused seeking a discharge, is a person of good character. Clearly the pre-sentence report establishes Mr. Basso as a hard-worker, determined and a life-long police officer who always had this profession as his goal. He received numerous letters of support from fellow officers and supervisors as to his work ethic, dedication and tenacity as well as his ability to teach other cadets and as a good community person.

[46] Contrasted with that are the two sustained disciplinary proceedings under the *Police Act*. Both of those allegations, determined he acted in a disorderly fashion and such would bring discredit on the reputation of the police department, in that he neglected to or acted without adequate reason, failed to promptly, properly or diligently, perform a duty as a member and in one of the allegations he failed to properly follow protocols for exhibits. It is not lost on this court that documentation of his interaction with Mr. Simard was seriously lacking as well.

[47] In the most recent disciplinary action, he was given a 10-day suspension of pay.

[48] In keeping with *Fallofield*, (*supra*), *Doane* and *Dalton*, (*supra*), it also has to be decided whether the imposition of a conviction would not be contrary to the public interest should the first pre-condition be met. The public interest involves the public seeing that courts take seriously crimes committed that are not otherwise “trivial, impulsive, harmless or otherwise inconsequential”, to borrow the words of Chief Justice MacKeigan.

[49] In this case, we have a seasoned police officer encountering a homeless man at a shelter in the city center on a cold February night, after midnight, who was asking for assistance from the police having been evicted from Metro Turning Point. Cst. Basso told Mr. Simard he would not take him to the drunk tank, it was not a hotel and suggested he go on his way. As explained by Mr. Simard, which was accepted by this court, he was not prepared to go on his way as he felt he was in danger of freezing to death. He had been dismissed from the Metro Turning Point for drinking in his bunk and he had nowhere else to go. Cst. Basso determined Mr. Simard to be resistant and the gratuitous punch was launched by the officer toward Mr. Simard for no justifiable reason.

[50] How this court could ever justify, the not recording of a conviction, as being in the public interest, is unfathomable to me. Mr. Simard simply wanted assistance from the officer by seeking shelter. Instead, he suffered a broken nose from that very officer.

[51] The prerequisites for a discharge, be it conditional or absolute, are not before this court and one will not be ordered.

[52] What then is the proper sentence for Mr. Basso?

[53] Mr. Basso has, as I referred to earlier, provided a letter to the court suggesting that in order to do his job properly and to look after his own mental health, which I completely support as being necessary and appropriate, he has to move on once the call is over. He says it becomes insignificant to him, as he can not allow it to be more than that, as he has to be prepared for the next call.

[54] In that letter Mr. Basso writes to the court:

As you know, I have been a police officer for 18 years and have served my community in the city of Calgary and Halifax Regional Municipality. What you likely don't know is that being a police officer is the only thing I've ever wanted to be since as long as I can remember.

Policing is not a job to me, it is a passion. It is the thing that I love to do the most in this in this world. I may be one of the most relentless and tenacious investigators that has ever sat before you on the stand and I wish I had sitting on the other side so you could see that Gary Basso...

During my testimony, I said the words ‘it was a non event to me’ to me and I realize that you took this as me being very cavalier about a very serious situation. I would like to explain myself. I learned at 21 years of age that to do this job, be successful and look after your mental health, you have to have coping mechanisms in place to deal with the stuff that you see and deal with in day in and day out. My way of dealing with things is to try to not become emotionally attached to any type of call, not matter what it is. I have seen children and adults die of car accidents, suicides and homicides, a person decapitated after being hit by a train. I’ve had a knife pulled on me in two different occasions, I’ve had a gun pulled on me. All before the age of 25. I worked in the roughest neighbour in Calgary when I was a rookie and I’ve worked in all the roughest neighbourhoods in HRM over the past 15 years. I’ve been on hundreds of calls that could have cost me or another police officer, their life. I’ve been in dozens and dozens of physical altercations throughout the years. I have sat inches away from murder suspects who are the baddest of the bad conducting interrogations...

My way of dealing with things for my own mental health is to move on from them once the call is over, becomes insignificant, because I cannot allow it to become more than that where I can’t be prepared for the next call that I get dispatched to. So when I say ‘it was a non event to me’, it’s not because I lack empathy for Mr. Simard or because I have a cavalier attitude towards a serious offence, it is because that this is the way I need to treat things to keep myself mentally prepared to do a job that most people could not relate to.

As far as the physical alteration between myself and Mr. Simard, I would like you to know that I wish that it never happened. I don’t wish that it never happened because I was charged, but because it is an unfortunate event anytime a police officer needs to use force. The risk of losing a career that I love and going from enforcing the law and protecting the people to being 39 years old and having to try to start over with a criminal record. I cannot begin to explain how heartbreaking that is or the stress that goes along with it.

The letters, accommodations, etc, are not my words but the words of my peers who know the Cst. Basso that they have seen in the best and the worst of situations. I thank you for your time.

[55] The court understands that in large measure however, what sometimes happens, is the human element in many professions, not just policing, is that the “right now” gets overlooked. I saw the following comment in the *Baxter* decision, (*supra*), and feel it is most appropriate to this circumstance to repeat it.

[56] At paragraph 35:

There is a danger in many positions, especially dangerous in positions of authority, that mere habit might cause us to lose sight of the inherent humanity of those with whom we deal, no matter what they have done or how they present themselves. This is a danger that judges and police officers must perpetually be alive to. I can think of no better expression of that danger than the words of G. K. Chesterton:

‘The horrible thing of all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policeman, is not that they are wicked, (some of them are good), not that they are stupid, several of them are quite intelligent) it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.’

These are the words that should be imprinted on the consciousness of every person who wields significant authority over any other person. They should be on the curriculum of every police college, law school and judicial training institute they should be on display in every police division and every courthouse. We should all aspire never to lose sight of them....

[57] I have reviewed all of the decisions provided to me by counsel. I have considered the reasons from many learned judges in this province, and across this country, in terms of sentencing police officers for crimes that take them outside of the very law they were sworn to uphold. The need for denunciation of the type of assault perpetrated upon Mr. Simard and general deterrence has to be paramount.

[58] The victim impact statement of Mr. Simard has been considered as well. It provides:

Physical issues

My injuries included a broken nose, Concussion, face injuries and a black Eye. I had problems breathing through my nose for almost 3 months after the attack. I started to get new and very bad headaches for about 3 months too. I have been without medication for those pain due my concussion the doctor told me was unsafe use medication. Now my nose is curved. At that time can't sleep properly and a lot of pain.

Emotional issues

After this event I been in the bush alone without contact with nobody and been like a ghost. was hard and was unsafe too. nobody knew where I was some days. I was so depress or too much anger inside me or thinking hang myself, all kind emotion like that (close my eyes forever or make a mistake) I lost control on my consumption of alcohol (drinking more than I did before). Was a very long wait until the trial start. I was worry to go in town and use the resources but no choice I really need to go in town for shower or laundry stuff like that. I'm a strong man definitely not invincible (exhausting) Was stressful show up in town worry about the police officers due to the suspension of Basso. was not a good situation and I was right. later on I got a few problems with them. (POLICE) They arrest me for public intoxication many times, a lot time to the headquarters, a lot fine \$\$\$, a lot of things faded away, they insult me and treat me some time like a peice of shit. My opinion for that they want put so much pressure on me until I leave the province (no victim no charge) I almost did. It's not comfortable to be a target. Now today I wrote this letter and I hope will be the last move I need to do I have an off I want turn the page definitly. So many years without problems with the justice and my visit to Halifax turn my life like a nightmare. To be poor I deal with but I still a proud man.

With all my respect

Patrice Simard

[59] In all of the circumstances of the offence, the particulars of this offender, the moral blameworthiness as the sole perpetrator of this assault, and the case law that I have referred to, Mr. Basso, I sentence you to three months incarceration. Given the calendar date, that would be 90 days from today, is 3 months forward.

[60] You will be subject of a s. 109 firearms prohibition for a period of 10 years, and a primary DNA order.

[61] I have thought considerably about whether there is a need for rehabilitation requiring you to be placed on probation or not. The Crown has not sought it; however, I feel it is appropriate in the circumstances. This was an unprovoked assault that caused bodily harm and suggests to me an investigation of anger management is necessary, that perhaps such, was undetected, and this is a most unfortunate event.

[62] I am placing you on probation for a period of 12 months, that you; keep the peace and be of good behaviour; report to a probation officer within 10 days and be under their supervision; take assessment and counselling as directed by your probation officer for anger management and any other counselling he or she feels is appropriate and you are to have no contact, direct or indirect, with Jean Marc Patrice Simard.

[63] Mr. Basso, I am open to you serving this sentence intermittently if that is the request.

Laurel Halfpenny MacQuarrie
J.P.C.