

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Riley-Zwicker*, 2023 NSPC 15

Date: 20230503

Docket: 8543174, 8543175

8607435, 8607436

8639264, 8639265

8653319, 8653321

Registry: Kentville

Between:

His Majesty the King

v.

Jason Wayne Riley-Zwicker

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	April 17, 25, 26 and 27, 2023, Kentville, Nova Scotia
Decision	May 1, 2023
Charges:	145(4) and 145(5)(a) of the Criminal Code of Canada 266 and 145(4)(2) of the Criminal Code of Canada 145(4)(a) and 733.1(1) of the Criminal Code of Canada 145(5) and 733.1 of the Criminal Code of Canada
Counsel:	Nathan McLean, for the Crown Lauran Haas, for the Defendant

By the Court:

[1] Mr. Riley-Zwicker is before the Court for sentencing on four separate matters that occurred between January 26, 2022, and January 25, 2023. The parties differ as to what constitutes a fit and proper sentence.

The facts:

[2] On January 26, 2022, police were called to Glooscap First Nation in response to a possible domestic assault. They arrived to find Ms. McLellan's house in disarray. Mr. Riley-Zwicker was, at the time, subject to a condition in a Release Order not to attend the first nation and another prohibiting communication with Ms. McLellan who is a member of the Glooscap community. Finding him there in her house, police arrested him for breaching two conditions of that Order. The Crown seeks 60 days on each charge to run consecutively one to the other, for a total of 120 days. The defence seeks 20 days for each offence, to run concurrently one to the other, for a total of 20 days.

[3] Eight months later, on September 21, 2022, with the Release Order conditions still in effect, Mr. Riley-Zwicker was present at Ms. McLellan's house when a band employee, Ms. Turkey, attended there to assess the house prior to Hurricane Fiona. Mr. Riley-Zwicker took exception to her attendance at the property and told her Ms. McLellan was not at home. Ms. Turkey informed him of her role with Glooscap First Nation and began taking photographs. Mr. Riley-

Zwicker then pushed/shoved the woman while telling her to “Get off my property”. Police charged him with breach of the aforementioned condition of the Release Order not to attend the Glooscap First Nation, and assault on the band employee. The Crown seeks 90 days for the assault and 60 for the breach to run consecutively one to the other, for a total of 150 days, This sentence would be served consecutively to the prior sentence. The defence seeks 45 days for the assault and 30 days for the breach to run concurrently one to the other.

[4] Two months later, on November 19, 2022, police attended Mr. Riley-Zwicker’s apartment in Kentville in response to complaints from neighbours of a domestic issue. Mr. Riley-Zwicker answered the door and told police he had been arguing on the telephone. That proved not to be the case as Ms. McLellan came out of a bedroom and he was arrested for, once again, breaching the no contact condition of the Release Order, and since he was now on probation following conviction and sentencing for threatening Ms. McLellan, was also charged with breaching the no contact provision contained in that July 2022 Probation Order. The Crown seeks 60 days for each offence to run consecutively one to the other. These would run consecutively to the previous sentence. The defence seeks 30 days for each offence to run concurrently one to the other.

[5] Finally, on January 25, 2023, police were on patrol looking for Mr. Riley-Zwicker and Ms. McLellan to follow up, yet again, on more complaints of

domestic issues. At his apartment they saw the two arrive by taxi. Still subject to both of the aforementioned orders, he was charged with two breaches. The Crown and defence jointly seek 30 days for each offence to be served consecutively, based on a joint recommendation.

[6] The Crown seeks a total sentence of 420 days¹, and the defence seeks 155 days, or time served. The parties agree a 24-month Probation Order will also be imposed. The Crown seeks a no contact order with Ms. McLellan. There will also be a mandatory firearms prohibition ordered pursuant to s. 109 of the *Code*.

[7] He has served 109 days on remand and there will be credit of 1.5, for a total of 154 days.

[8] Because there are four offences arising on different dates, the Court will follow the procedure for sentencing set out by our Court of Appeal in *R. v. Adams*, 2010 NSCA 42, *R. v. Laing*, 2022 NSCA 23 and *R. v. Campbell*, 2022 NSCA 29.

[9] Those cases remind a sentencing judge to first determine the appropriate sentence for each offence by applying the proper principles of sentencing, then consider whether any of those sentences should be consecutive or concurrent one to the other and, finally, applying the totality principle, described as taking “one

¹ The Crown’s math on the recommendation sheet did not account the second 30 days consecutive sentence for the third offence, and so the correct number is reflected here.

last look” or a “look back”, determine whether, taking into account the overall culpability of the offender, the total sentence is “crushing”, unjust, or appropriate and not excessive.

[10] Cumulative sentences are also addressed at s. 718.3(4) of the *Code*.

Cumulative punishments

(4) The court that sentences an accused shall consider directing

(b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when

(i) the offences do not arise out of the same event or series of events,

(ii) one of the offences was committed while the accused was on judicial interim release...

The Criminal record:

[11] Mr. Riley-Zwicker has an extensive criminal record. Between 2001 and 2022 he has amassed fourteen charges for breach of probation and twenty-five charges for breaches of release orders. He has also committed five driving while prohibited offences. He has difficulty complying with court orders.

[12] The Crown relayed a July 2022 consolidated sentencing hearing where he received 145 days time served for: resist [10 days], driving offence, theft [five days], refusal, at large [30 days], impaired [30 days], breach [15 days], driving while disqualified [fine], **breach [15 days]**, the aforementioned **threat to Ms. McLellan [10 days]**, **breach probation [30 days]**, **breach probation [10 days]**.

He was also placed on probation with a no contact provision with respect to Ms. McLellan, which he breached and is before the Court for sentencing.

[13] The Crown also relayed details of a June 2021 sentencing for a January 7, 2021, assault, mischief, and breach of probation for which he received 67 days custody on each, concurrent one to the other.

[14] The Court was also told that on June 14, 2021, he was sentenced to a day for a breach and time served, the number of days being unclear, and also for a 145, breach of probation, and at large charges.

[15] On March 22, 2021, he was sentence to time served for at large, unlawfully in a dwelling, and a breach, for which he received six, ten, and 30 days.

[16] July 21, 2020, for domestic threats he received 12 months probation.

[17] In July 2019 for failing to comply with a release order, he received one day deemed served.

[18] August 2019, he received a fine for resisting.

[19] May 2019, he received a one-month CSO for disturbing the peace, a three-month CSO for two mischief charges.

[20] In 2018 he received a 12-month CSO for assault causing, breach, and failure to comply with release conditions.

[21] In 2017 he received **three months for breach of a recognizance** and one month in custody for another, as well as four months in custody for theft of a motor vehicle, impaired four months, and over eighty-four months.

[22] CPIC also outlined a 2016 Saskatchewan *Criminal Code* driving offence, take a motor vehicle, and **breach of conditions for which he received six months in custody.**

[23] In Alberta in 2015 he received 120 days for a breach, possession of a weapon, firearms offences, and two breaches of recognizance. Also, in 2015 he was sentenced for assault, sentence unclear. For breach of recognizance, he received 30 days, obstruction the same, and carrying a concealed weapon one month.

[24] While the record clearly extended well beyond this time the Crown chose to stop there.

Personal circumstances:

[25] A presentence report was not prepared for the matter. The Court is, however, aware that the John Howard's Society offered Mr. Riley-Zwicker bail support in February 2022 for one of these matters and described his needs as follows:

We understand that Mr. Riley-Zwicker's priority needs include shelter/housing, mental health and addictions support, reliable income, valid identification, and connections to supportive community programs. Resources will be engaged to support basic needs right away. Over the intermediate and longer term, our

Transition Team can engage the relevant resources necessary to help Mr. Riley-Zwicker move closer to independence and stability while also building his network of support.

[26] Ms. Haas advised the Court that her client needs to access mental health and addiction services. They both describe the relationship with Ms. McLellan as toxic. Over the course of these matters, he secured an apartment and undertook employment with a family member before being remanded on the January 2023 offences. His future plans include accepting his mother's offer to pay for a six-week diving course so that he can obtain employment in the fishing industry in New Brunswick.

Allocution:

[27] Mr. Riley-Zwicker took the opportunity to allocute, he says the last time he was released on \$500 cash bail he was homeless and complied with the Court's direction to report to police every single day, and despite losing his job while incarcerated, was able to find one with his uncle and even locate an apartment. He acknowledged most of the offences involve breaches, and says the day he assaulted Ms. Turkey he was emotional because she was taking pictures of the area where he had buried his dog.

[28] He says after securing the apartment, he and Ms. McLellan were still in a relationship even though they were not allowed to see each other and the combination of Covid, drinking, and her job loss were factors in the breaches. He

says they both suffer from addiction- his down, hers is up. He says he has tried to resolve the no contact provisions by going to the probation officer, who was described as a fill in probation officer, but that person told him there would be no agreement to vary conditions until he took courses. The courses were at the time full.

[29] Mr. Riley-Zwicker says that October, November, and December saw Ms. McLellan constantly reaching out to him, and it is clear she did not realize how much of a risk he was taking to have contact with her. He recognizes as toxic the relationship with her, and says he now understands that he “can't change her”.

[30] Fairly consistent with what the Court is hearing from other people who are currently incarcerated in Burnside, Mr. Riley-Zwicker is also upset about the conditions in the institution and outlined a number of unenviable situations he has had to endure. He says he does not deserve thirteen additional months in jail because he is having a challenging time there and cannot take it anymore. He says he did not expect that he would receive time in that range.

Characterising the offences:

[31] Mr. Riley-Zwicker quite deliberately chose to ignore court orders and has a long history of doing so. The decision to repeatedly breach no-contact provisions appears to occur with full knowledge of the consequences. The police and the Court are undermined in the effort to protect Ms. McLellan when such conditions

are breached. These conditions are, after all, imposed when there are allegations of domestic violence. In this case the allegations involved a vulnerable Aboriginal woman, who Mr. Riley-Zwicker acknowledges has a drug addiction. His level of responsibility is high.

[32] Additionally, it is distasteful to argue that Ms. McLellan, the victim of threats, is somehow responsible for overcoming Mr. Riley-Zwicker's will and causing him to take on the risk of arrest. To be clear, he chose to attend a first nation where he is not a member and violate the sanctity of that place by assaulting a band employee who was simply trying to protect band property before a hurricane. That he felt entitled to call Ms. McLellan's house his own, and excused his actions because his recently deceased dog was buried on the property, does not mitigate his assault on a human being at a place she was entitled to attend.

[33] There is the strong suggestion of an addiction, however the Court does not have enough detail to determine if addiction was a factor during these flagrant breaches of court orders or in the decision to assault the female band employee. The seriousness of these administration of justice violations are aggravated by the fact they are reported to police by citizens who call to report concerns about domestic incidents.

[34] General and specific deterrence are important sentencing principles in administration of justice offences and denunciation also plays a role in the assault charge.

The position of the parties:

[35] There is no doubt Mr. Riley-Zwicker is a recidivist offender. The Crown points out that while there is, generally speaking, a 30-day benchmark for breaches after an offender has been subjected to fines for failing to comply with court orders, Mr. Riley-Zwicker is well past the point where he should be receiving 30-day sentences that are simply too low to account for the repeat offending and the domestic context.

[36] The Crown says sentence after sentence has failed to lead to the hoped for deterrent effect, they are clearly ineffective, and as a result must be increased in the hope he will finally get the message that he must stay away from Ms. McLellan, and in circumstances that attract public attention and concern.

[37] Much has been said about the victimization of Aboriginal women and, in this case, this woman is continuously in Mr. Riley-Zwicker's company, his actions have disrupted the peace of her home and her First Nation community. The Crown points out that the majority of his offending relates to this woman and the level of concern is heightened given that he also saw fit to assault the band property manager who was simply conducting business before a hurricane in an effort to

secure communal property. He notes Mr. Riley-Zwicker was not even allowed to be on that property, is not a member of a First Nation, and was there in clear violation of a court order, yet took the opportunity to assault a person authorized to be on that property.

[38] The Crown says a fit and proper sentence for these offences is 420 days in jail. Recognizing the time spent on remand, and applying the modifier deduction of 164 days, leaves a total of 256 days to be served on a go forward basis. He reminds the Court that rehabilitation is always a factor on sentence, and counseling should be ordered during a period of probation. He points out that the defence will be asking the Court not to impose a no contact order with Ms. McLellan, but noted that it is not in the public interest for him to continue to have contact with her as doing so continues to bring him into difficulty with the law and extends to other private citizens.

[39] The defence counsel does not dispute that a period of custody is required, however seeks 155 days deemed served by the time Mr. Riley-Zwicker has already been in custody. She says while denunciation and deterrence require more than 30 days for breaches, the January 26, 2022, offences should receive 20 days each. She points out that he has, over the course of this time, found an apartment, and while Ms. McLellan was found in it, they did have an addictive relationship and there are limited resources in the community to address his mental health concerns. She

points out that Mr. Riley-Zwicker tried to comply with the orders, and also made effort to seek variations to the no contact conditions. The question must be asked, what is he supposed to do if she wants to have contact with him.

[40] Defence counsel also points out that the assault on the band employee was a fairly minor push, and Mr. Riley-Zwicker has been in custody for a long time in very unfortunate circumstances. She points out that the Burnside jail is, at this time, like a tinderbox. He has experienced delay in receiving his daily timed dose of suboxone, and is in serious need of a dental appointment to address a rotting tooth. While he has made applications to go to the doctor, he not yet been seen. She says Mr. Riley-Zwicker is hopeful that if he is released today, he will be able to attend a diving course and move to New Brunswick to fish.

Mitigating and aggravating factors:

[41] Mitigating factors include his guilty plea, although the Crown cases appear quite straightforward and strong. He seems remorseful, although blames Ms. McLellan. His homelessness may have supported his decision making, but he benefited from the John Howard Society support at times. He professes an addiction, presumably to alcohol. Scarce judicial resources were saved as a result of the pleas and witnesses did not have to testify.

[42] Aggravating factors include the extensive and related criminal record. While these are not domestic offences, *per se*, Ms. McLellan is the victim of his threats that led to the violated Probation Order and time in custody. He continues to contact this Aboriginal woman despite police and court efforts to separate them. His actions engage the public and made a victim of a female band employee on band property that he is not entitled to attend, while she tried to secure property before a major hurricane.

Parity:

[43] The Court was not provided case law for consideration, but it is fair to say breaches of court orders are regularly before the court, as are charges of assault. The sentence range is wide depending on the circumstances.

Analysis:

[44] The Court notes Mr. Riley-Zwicker could be described as a relentless re-offender. The Court is a revolving door, and he appears to have little interest in following court orders or conducting himself in a law-abiding manner. On the strength of his past sentencing decisions, it is clear he has been sentenced to more than 30 days for various breaches. For example, in July 2021 he received 67 days for breaching a probation order. As a result, it is easy to conclude that he has reached a point where short 30-day sentences for breaches are no longer a viable sentencing option. The Crown is correct to say the sentences should be higher.

Based on his allocution, it almost appeared he had balanced the cost/ benefit of the offences when he said he did not expect an additional 13 months.

[45] Addressing the first offence in time, Mr. Riley-Zwicker was subject to two different release conditions, one aimed at keeping him off Ms. McLellan's first nation where allegations had arisen, and also to protect her from contact with him. These are quite different conditions, and one does not presuppose the other. His actions that day led to community members calling the police and some degree of chaos at Ms. McLellan's home.

[46] The Supreme Court of Canada recently commented on the decision to impose concurrent or consecutive sentences in *R. v. Friesen*, 2020 SCC 9:

[155] The decision whether to impose a sentence concurrent with another sentence or consecutive to it is guided by principles. While the issue warrants further discussion in another case, the general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences (see, e.g., *R. v. Arbuthnot*, 2009 MBCA 106, 245 Man.R. (2d) 244, at paras. 18-21; *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, at para. 84; *R. v. Desjardins*, 2015 QCCA 1774, at para. 29 (CanLII)).

[47] For those offences, sentences of 45 days each consecutive one to the other is fit and proper. He had already been involved in allegations of crime involving this vulnerable Aboriginal woman and efforts aimed at protecting her were rendered fruitless by his blatant scoffing of the conditions of his release. I do not accept that

he had no choice but to be in her residence. The sentence is 45 days and 45 days consecutive.

[48] With respect to the next in time offence. Despite it having been made abundantly clear that he was not to be on Glooscap First Nation, he attended there and presumably considered Ms. McLellan's house his own, since he told the band employee to get off his property. The assault, while a push, was rendered serious given he was not entitled to be there in the first place, was not a member of the first nation, and was frustrating a woman in her effort to secure band property. The assault on a virtual stranger to him, requires a sentence of 90 days. That he was repetitively attending that property and had been recently involved in breaching the release order, renders a consecutive sentence of 60 days fit and proper.

[49] With respect to the offence involving Ms. McLellan at his apartment, and the call to police from neighbours, by that time he had pled guilty to threatening her, was breaching both a Release Order and a Probation Order. The latter followed acknowledgement of guilt and renders this offending behaviour more troubling as even he understood contact could not occur until he had served some portion of the sentence and obtained the counselling ordered by the sentencing court. For these offences, a fit sentence is two 60 days periods consecutive one to the other recognizing the breach of probation occurred while on release conditions. (s. 718.3(4))

[50] Finally, arriving in a taxi with Ms. McLellan while subject to both orders represents continued flagrant scoffing at court orders. I recognize that the Crown undertook not to resile from a request for two 30- day sentences to run consecutively one to the other. On the off chance this was done to secure the guilty pleas, I will impose that sentence.

[51] Taking a look back, these sentences would run consecutively one to the other as they are all independent offences that, in some cases, occurred months apart, Considering the principle of totality, I find the total sentence of 420 days unduly harsh. Given the reportedly harsh circumstances experienced by inmates in Burnside, the consecutive sentences for the third in time offence will run concurrently one to the other (60-days). I will also permit the 45-day sentences on the first in time offence to be served concurrently one to the other. So, 315 days minus remand 164 leads to a sentence of 151 going forward.

[52] The Conditions of the drafted two-year probation order will also be imposed, including a no contact provision with respect to Ms. McLellan.

[53] Judgement accordingly.

van der Hoek PCJ.