PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Falcitelli*, 2025 NSPC 40

Date: 20251202
Docket: 8885276, 8885277
Registry: Pictou

Between:

His Majesty the King

v

Dakoda Vernon Falcitelli
and
Tyler Drummond Chase MacRae

SENTENCING DECISION

Judge: The Honourable Judge Del W Atwood

Heard: 2025: 10 September, 6 November, 2 December in Pictou, Nova Scotia

Charge: Section 267(b) *Criminal Code* [*Code*]

Counsel: Allison Avery for the Nova Scotia Public Prosecution Service
Robert M Sutherland for Dakota Vernon Falcitelli
Marko Simmonds for Tyler Drummond Chase MacRae

By the Court:

Synopsis

[1] Dakoda Vernon Falcitelli and Tyler Drummond Chase MacRae were charged jointly in information 883253 with committing an aggravated assault upon Stephen Nicholas Fraser. The prosecution later amended the charge to assault causing bodily harm (¶ 267(b) of the *Code*), and proceeded indictably (case 8885277 for Mr Falcitelli; case 8885276 for Mr MacRae).

[2] Mr Falcitelli and Mr MacRae elected to have the charge dealt with in this Court and pleaded guilty.

[3] The offence occurred the late evening of 31 December 2024, New-Year's Eve, outside a licensed establishment in New Glasgow.

[4] The prosecution seeks a conditional-sentence order [CSO] for each, with a duration of 12 months, followed by 18 months of probation, along with primary-DNA, § 109-weapons-prohibition, and restitution orders.

[5] Defence counsel seek conditional discharges and probation—12 months for Mr MacRae, 18 months for Mr Falcitelli.

[6] For the reasons that follow, I decline to impose CSOs.

[7] Instead, the Court will discharge Mr Falcitelli and Mr MacRae conditionally, and place each of them on probation for terms of 24 months, which will include restitution requirements. The Court will grant primary-designated-offence DNA-collection orders for each, § 109 orders for each (with an employment-related exemption for Mr Falcitelli), and impose $200 victim-surcharge amounts for each with 6 months allowed for payment.

Inventory of evidence

[8] The following exhibits were tendered in evidence during the sentencing hearing:

Exhibit #	Tendered by (P=prosecution DF=defence Falcitelli DM=defence MacRae)	Description of exhibit
1	P	Victim-impact statement of Stephen Nicholas Fraser.
2	P	Two photographs of Mr Fraser's injuries.
3	P	Five video files on a thumb drive (one police dashcam video; three CCTV videos of the interior of a local licensed establishment showing interactions among Mr Fraser, Mr Falcitelli and Mr MacRae prior to the offence; one CCTV video of the exterior of the bar showing the assault upon Mr Fraser).
4	P	A police report with description of CCTV footage with time stamps.
5	DM	A medical report for Mr MacRae.
6	DM	Reference letter for Mr MacRae.

7	DF	A 17-TAB binder of sentencing material for Mr Falcitelli.

[9] The sentencing hearing began with the prosecution reading into the record most of what was tendered eventually as Exhibit 4, a police summary of the CCTV video files. After inquiring of counsel, and pursuant to § 723(3) of the *Code*, I requested production of the CCTV video files, which were then played in the court room.

The video recordings

[10] As described in the inventory of evidence, Exhibit 3 contains five video files:

- PC 108 Dash Cam: This police dashcam video records police arriving at the scene of the assault on Mr Fraser; it shows the aftermath, and is not informative of the circumstances of the offence.

- RACK2_ch 2: This and the next 3 CCTV video files were recorded on a system maintained by the owners of the licensed establishment where the offence occurred; this file begins at a displayed time marker of 23:53:46 hrs on 12-31-2024 and ends 00:53:40 on 01-01-2025. Most of the relevant action occurs within the first three minutes. The camera appears to be pointed toward the main doors with a vending machine and ATM to the left.

- RACK2_ch4: This file begins 23:55:22 on 12:31:2024 and ends 00:55:08 on 01-01-2025. The displayed time markers are synchronous with "ch2". Most of the relevant action occurs within the first two minutes. The file depicts the same area of the establishment as shown in "ch2"; however, the camera for this file appears to be positioned over the main doors and is pointed toward the end of the service bar that is nearer the main doors.

- RACK 2_ch5: This file begins at 23:53:59 and concludes 00:53:56. It is synchronous with the "ch2" and "ch4" The field of view is the entire length of the service bar, with the area approaching the main doors on the lower left of the viewing field.

- RACK 2_ch 6: This file begins at 23:54:26 and ends 00:54:09. The markers are synchronous with "ch_2", "ch_4" and "ch_5". This file records the exterior of the establishment, a landing, and two concrete steps down to the sidewalk. I consider this to be the most informative recording, as it captures the assault on Mr Fraser.

Timeline analysis

[11] Based on the CCTV video files, the following are the relevant time-stamped observations:

- 23:53:47: Mr MacRae (wearing a read ballcap and a black t-shirt) and Mr Falcitelli (wearing gray ballcap backwards, along with a dark jacket with a hood) arrive at the end of the bar closer to the main doors. They stand in front of a trophy case. Mr MacRae's attention appears to be focussed on someone at the other end of the bar.

- 23:55:13: Mr MacRae makes a double-fisted, arms-pumping gesture, which I infer was a challenge to fight, and then signals with his raised right hand that he is going to head outside. The gesture appears to be picked up by Mr Fraser, who is at the far end of the bar, standing behind a seated patron who is wearing a ballcap with what appears to be a red Circle-K insignia.

- 23:55:20: Mr Fraser signals that he accepts Mr MacRae's challenge, and he and the person with the Circle-K hat head toward the main doors, jostling a female patron along the way.

- 23:55:22: Mr MacRae and Mr Falcitelli, clearly animated and excited by what they see at the other end of the bar, head toward the main doors. Mr MacRae proceeds outside; Mr Falcitelli waits in the hallway.

- 23:55:33: Mr MacRae charges out the main doors, walks quickly down the steps to the sidewalk, turns his hat around backwards, and adopts a posture showing that he is ready for a fight.

- 23:55:49: Mr Fraser approaches Mr Falcitelli's position in the hallway and the two of them shove each other for several seconds. A person in a black, long-sleeve shirt and black ballcap (possibly a doorman) intervenes. Mr Fraser proceeds toward the door, with Mr Falcitelli behind him.

- 23:55:56: Mr MacRae rushes up the steps and has an animated conversation with two individuals (one of whom is the bar patron with the Circle-K hat who appears to be trying to de-escalate the situation).

- 23:56:13: Mr Fraser tries to push open one of the main doors to get outside. The doorman gets past Mr Fraser and tries to intervene.

- 23:56:24: Mr Fraser gets though door. He appears to push Mr MacRae, who instantly swings at Mr Fraser.

- 23:56:26: Several persons get involved in the action, most trying to pull Mr Fraser and Mr MacRae apart; Mr Falcitelli emerges in behind Mr Fraser and to Mr Fraser's left.

- 23:56:30-39: By this time, Mr MacRae has been pulled away from Mr Fraser by by-standers. Mr Fraser has had his shirt almost pulled off, and appears to have fallen into a seated position on the lower step or the sidewalk. For the next 9 seconds, Mr Falcitelli kicks Mr Fraser nine times on the left side of his body; he stops only when a woman wearing a black jumpsuit intervenes and pushes him away. Other fights break out.

- 23:56:44-53: Mr MacRae walks from the sidewalk out onto the street. Mr Fraser stands up and moves aggressively toward Mr MacRae. Mr Fraser swings at Mr MacRae; he does not connect, and falls down onto his back. Mr MacRae kicks the left side of Mr Fraser's head once, and then punches him several times in the head with a fist. Mr Falcitelli steps in and kicks a prone Mr Fraser once on the right side of his face. The woman in the black jumpsuit pushes both Mr Falcitelli and Mr MacRae away from Mr Fraser, who appears to be unconscious on the roadway.

- 23:56:53-23:57:18: Mr MacRae remains pacing around Mr Fraser, at one point gesturing toward him in obvious rage. Mr MacRae throws punches at a bystander who tries to pull him away.

- 23:27:55: Police arrive. Mr MacRae and Mr Falcitelli have walked away from the area by this point.

- 23:58:54: Aided by the woman in the black jumpsuit, Mr Fraser is able to get to his feet and is led away from the area.

Injuries suffered by Mr Fraser

[12] The prosecutor provided the Court with details of the injuries suffered by Mr Fraser when he was attacked by Mr Falcitelli and Mr MacRae:

- Left orbital-medial-wall-blow-out eye fracture with partial herniation of the medial rectus; surgery not required.
- Left eye subconjunctival hemorrhage and conjunctival laceration; surgery not required.
- Right ulnar/scaphoid hand fracture; orthopedic surgery required.

Economic loss

[13] The Court conducted a sentencing hearing on 10 September 2025; I reserved my decision to 6 November 2025. On 31 October 2025, the prosecution informed the Court that it would seek to re-opening the sentencing hearing to make an application for restitution on behalf of Mr Fraser in the amount of $24095.32.

[14] On resuming proceedings on 6 November 2025, the prosecution filed with the Court a Request for Restitution [RFR] form which Mr Fraser had completed 20

March 2025. It was not made clear why the RFR form was not presented to the Court during the 10 September 2025 sentencing hearing.

[15] I inquired of defence counsel whether the RFR was controversial. Both defence counsel were content to leave the issue of restitution up to the Court, and neither sought to contest the RFR.

[16] It quickly became apparent that Mr Falcitelli and Mr MacRae wished to consult with their counsel on this point; the Court adjourned the sentencing hearing to allow defence counsel to obtain proper instructions.

[17] The adjournment was fortuitous.

[18] This is because, on the resumption of proceedings today, the Court was presented with a joint submission by all counsel that Mr Falcitelli and Mr MacRae each be responsible to pay $6000 in restitution to Mr Fraser, for a total of $12,000—a significant reduction from the initial claim. The reason for the adjustment was that counsel had identified income replacement that had been paid to Mr Fraser during his convalescence.

[19] This evolution of the RFR part of the proceedings underscores the importance of counsel having clear instructions from their clients before taking

positions that abridge, diminish or surrender the rights of accused persons to contest controversial sentencing issues.

Statutory range of penalty

[20] Prosecuted indictably, a ¶ 267(b) charge carries no mandatory-minimum penalty, and a maximum of 10-years' imprisonment.[1] A sentencing court may legally impose a discharge (§ 730), a suspended sentence with probation (¶ 731(1)(a)), a fine alone (§ 734), an intermittent sentence (§ 732), a CSO (§ 742.1), or various combinations of these punishments.

[21] Pursuant to § 487.04 of the *Code*, ¶ 267(b) is a primary-designated offence for the purposes of DNA collection. Pursuant to ¶ 109(1)(a) and § 109(2) of the *Code*, ¶ 267(b) attracts a 10-year/lifetime mandatory prohibition order. When a court issues a prohibition order, it may make an order under § 113 of the *Code* authorizing the chief firearms officer to issue to the prohibited person an authorization, license or registration certificate for employment purposes.

General sentencing principles

[1] Assault causing bodily harm had been a straight-indictable offence (carrying a maximum penalty of 10-years' imprisonment) until rendered hybrid in virtue of SC 1994, c 44, s 17, in force 15 February 1995. The maximum 10-year indictable penalty remains unchanged.

[22] Part XXIII of the *Code* identifies the fundamental purpose of sentencing in s. 718, and the fundamental principle to be applied in advancing that purpose in s. 718.1.

[23] Section 718 states:

> 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.

[24] Section 718.1 states:

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

[25] As the *Code* assigns high priority to proportionality, it is important that the court recognize that sentencing is a highly individualized process: *R v M(CA),* 1996 CanLII 230, [1996] 1 SCR 500 at ¶ 80 [*M(CA)*]; *R v Bertrand Marchand*, 2023 SCC 26 at ¶ 171; *R v Ipeelee* 2012 SCC 13 at ¶ 38 [*Ipeelee*]; *R v Scott*, 2013 NSCA 28 at ¶ 7; *R v Redden*, 2017 NSSC 172 at ¶ 28; *R v MacBeth*, 2017 NSPC 46 at ¶ 8. "Only if this is so can the public be satisfied that the offender 'deserved'

the punishment he received and feel a confidence in the fairness and rationality of the system": *Re BC Motor Vehicle Act*, 1985 CanLII 81, [1985] 2 SCR 486 at 533; *R v Hills*, 2023 SCC 2 at ¶ 111.

[26] In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances: ¶ 718.2(a) of the *Code*. The court must consider also objective and subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case: *R v Pham* 2013 SCC 15 at ¶ 8; *R v Boutilier*, 2018 NSCA 65 at ¶ 21; *R v Chambers*, 2024 NSCC 67 at ¶ 54; *R v Skinner*, 2015 NSPC 28 at ¶ 33, varied by 2016 NSCA 54.

[27] Assessing a person's moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. That fundamental principle is set out in s. 718.1 of the *Code*. In *Ipeelee* at ¶ 37, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims, and proportionality seeks to ensure public confidence in the justice system; it was characterised in *Ipeelee* as a *sine qua non* of a just sanction.

[28] In *R v Lacasse* 2015 SCC 64 at ¶ 12 [*Lacasse*], the SCC confirmed that proportionality is a primary principle in considering the fitness of a sentence. The severity of a sentence depends upon the seriousness of the consequences of a crime and the moral blameworthiness of the individual offender. A consequential analysis requires the court to consider the harm caused by criminalised conduct. *Lacasse* recognized that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of justice.

[29] Proportionality and retribution are linked very closely. As the SCC stated in *M(CA)* at ¶ 80:

> [T]he meaning of retribution is deserving of some clarification. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with "vengeance" in common parlance. See, *eg, R v Hinch and Salanski, supra*, at 43-44; *R v Calder* (1956), 114 CCC 155 (MBCA), at 161. But it should be clear from my foregoing discussion that retribution bears little relation to vengeance, and I attribute much of the criticism of retribution as a principle to this confusion. As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing. See Ruby, *Sentencing*, *supra*, at p. 13. Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. As R Cross has noted in *The English Sentencing System* (2nd 1975), at 121: "The retributivist insists that the punishment must not be disproportionate to the offender's deserts."

See also *R. v EMW*, 2011 NSCA 87 at ¶ 18-19.

[30] Pursuant to ¶ 718.2(b) of the *Code,* this court is governed by the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is the principle of sentencing parity. In *R v Christie*, 2004 ABCA 287 at ¶ 43, the Court held that:

> [w]hat we must strive for is an approach to sentencing whereby sentences for similar offences committed by similar offenders in similar circumstances are understandable when viewed together . . . .

[31] This is the penalty analog of the principle of legality: not only must members of the public know what type of conduct is criminalised—see, *eg*, *R v Lohnes,* 1992 CanLII 112, [1992] 1 SCR 167 at ¶ 27—they must know also the penalties that might be imposed for engaging in that conduct. The theory is that knowledge of both the risk of liability and the extent of liability will help those contemplating illegal conduct to make informed choices.

[32] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances. Furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstance. These restraint criteria are found in paras. 718.2 (d) and (e) of the *Code*.

[33] In *R v Gladue*, 1999 CanLII 679, [1999] SCJ 19 at ¶ 31 to 33, and 36, the Court stated that the statutory requirement that sentencing courts consider all available sanctions other than imprisonment was more than merely a codification of existing law. Rather, the provision was to be seen as a remedy whereby imprisonment was to be a sanction of last resort.

[34] The application of restraint criteria does not oust consideration of the other principles of sentencing in ss. 718-718.2; there is no such thing as a restraint-at-all-costs principle: *R v Proulx*, 2000 SCC 5 at ¶ 96. All principles and objectives of sentencing must be considered in arriving at a fit sentence: *R v Howell*, 2013 NSCA 67 at ¶ 16 [*Howell*].

[35] Significantly, ¶ 718.2(e) now states that such restraint must be "consistent with the harm done to victims or to the community". That clause was added to the *Code* by the *Victims Bill of Right Act*, SC 2015, c 13, s 24, in force 23 July 2015 in virtue of § 60(1) of the *Act*. As a result, a sentencing court must consider not only the circumstances of an offence and the degree of responsibility of the criminal actor; it must consider victim impact. At the same time, ¶ 718(a) of the *Code* was amended by adding the requirement that sentencing courts consider the need to denounce the harm done to victims caused by unlawful conduct.

[36] While principles of denunciation and deterrence must be considered in all sentencing hearings, there is a granularity to those criteria. Consequently, in applying the principle of deterrence, a sentencing court must bear in mind that all-important criterion of proportionality; the sentencing judge in *R v Matheson*, 2007 NSPC 43 discussed the tension between deterrence and individualization:

> 26 The Crown's submission that the right message needs to be sent by the sentence in this case essentially encapsulates what is intended by the concept of general deterrence. General deterrence supposes that others, with similar inclinations to the offender will be deterred, once they learn about the sentence, from committing a comparable offence. A sentence emphasizing general deterrence is intended to "deter those of like-mind who may be lured into the [drug] business with the hope of easy gain." (*R v Butler*, [1987] NSJ No 237 (NSSC, App Div).) The purpose of general deterrence is to "discourage potential offenders from becoming actual offenders." It has been referred to as the "punishment of the offender for what others might do." (*R v McGinn* (1989), 49 CCC (3d) 137 (SKCA).) Judges, such as Vancise JA in dissent in *McGinn*, have expressed serious reservations about the effectiveness of general deterrence. Vancise JA did so with the following comments at page 157:
>
> > Contending that longer sentences, for example, six months, would have a greater deterrent effect than a shorter sentence, for example one month, is to contend that: (1) the public will know of the sentence (a dubious proposition); (2) the potential offender will perceive the likelihood of apprehension (a more dubious proposition); and (3) the potential offender knowing he will likely be apprehended would commit the offence for the lower penalty of one month but not for the higher penalty of six months. Viewed in this way it is small wonder that an upward variation in sentences appears to have no effect on the crime rate.
>
> 27 The degree of publicity a case receives has also been remarked upon as relevant to the deterrent value of the sentence. Nunn J in *R v Clarke*, [1990] NSJ No 427 (NSSC), observed about Mr. Clarke's case: "If it receives no publicity then there is no general deterrence, other than the several people who may be in court at the time the sentence is given."

[37] To be sure, in light of the clear language of ¶ 718(b) of the *Code*, the court is obligated statutorily to consider the principle of deterrence in fixing every

sentence: see *Howell*; and see *R v Tran*, 2010 ABCA at ¶ 8-15. However, it is clear equally from the language of the preamble of the section—which requires a sentencing court to impose just sanctions that "have one or more of the following objectives"—that, in the absence of a statutory requirement (as in, say, § 718.01 of the *Code*) assigning primary consideration to denunciation and deterrence, there may be cases when a sentencing court may properly prioritize rehabilitation and reparation.

Mitigating factors

[38] Mr Falcitelli and Mr MacRae pleaded guilty very early on in proceedings. A guilty plea is a mitigating factor. Failure to consider a guilty plea as a mitigating factor can be an error in principle: *R v Friesen*, 2019 SCC 100 at ¶ 164 [*Friesen*]. While it has been suggested that a guilty plea offered in the face of overwhelming evidence will not necessarily attract so great a discount of sentence as one tendered in other circumstances (*R v RM*, 2019 BCCA 409 at ¶ 7-10; *R v Layte*, [1983] OJ No 2415 at ¶ 8 (Co Ct)), there were, at least potentially, triable issues in this case, such as party liability and the application of § 34 of the *Code*. Guilty pleas eliminated those sources of controversy. Furthermore, both Mr Falcitelli and Mr MacRae appear to be profoundly remorseful for their actions.

[39] Mr MacRae is 27 years of age. He does not have a criminal record; this is a mitigating factor: *R v Bertrand Marchand*, 2023 SCC 26 at ¶ 127; *R v Kaiser*, 2025 NSCA 56 at ¶ 59. It reflects a pro-social lifestyle, which is reflected in Mr MacRae's pre-sentence report [PSR].

[40] There is a caveat: Sometimes, a violent offence will be serious enough to warrant a prison term for a first offence, as violent offences generally call for terms of imprisonment: *R v Perlin*, 1977 CanLII 3240 (NSCA), [1977] NSJ No 548 at ¶ 8; *R v GAM*, 1996 CanLII 5582 (NSCA), [1996] NSJ No 52 at ¶ 32 (CA); *R v Hawkins*, 2009 NSSC 410 at ¶ 9, varied on other grounds, 2011 NSCA 7, leave to appeal refused [2011] SCCA No 102; and *R v MacNeil*, 2009 NSSC 310 at ¶ 31. One case of first-offence imprisonment was *R v Cormier*, 1994 NSCA 83 [*Cormier*] a sentence appeal involving a targeted, unprovoked, and calculated gang attack upon an innocent bystander; the NSCA took judicial notice of the increased activity of gangs of youths swarming innocent citizens on the streets of HRM and increased the 18-month term of probation imposed by the sentencing judge to a 6-month jail term followed by probation. However, the facts in *Cormier* are far more egregious than in this case.

[41] Mr Falcitelli is 28 years of age, and has one prior finding of guilt, for a conveyance offence in 2018; he has no record for violence. The gap principle is

applicable: The passage of an extended period of time since a person's last sentence is typically regarded as a mitigating factor, as that offence-free gap can be taken as circumstantial proof that the rehabilitative and deterrent intent of the earlier sentence actually worked.

[42] The gap principle was analysed in *R v Bernard*, 2011 NSCA 53 at ¶ 33-42. It is an element of the restraint principle in ¶ 718.2(d) and (e).

[43] However, the effect of the principle is diminished when protection of the public is dominant, as in cases of violence: *R v Chudley*, 2016 BCCA 90 at ¶ 26, cited with approval in *R v Simms*, 2020 NSSC 239 at ¶ 37.

Alcohol intoxication as a mitigating factor

[44] Mr Falcitelli told the PSR author that he was intoxicated at the time he attacked Mr Fraser.

[45] Substance-use disorder may be regarded as a mitigating when the person being sentenced does not have a criminal history. Further, Mr Falcitelli is not to be sentenced for his substance use. He is to be sentenced for what he did to Mr Fraser. See *R v CPS*, 2010 ABCA 313 at ¶ 4.

[46] There may be circumstances when substance-use disorder may work as an aggravating factor: when the person being sentenced has a history of committing

violent acts when alcohol impaired, or when the person resists indicated clinical intervention: *R v Head*, [1970] SJ No 266 (CA); *R v Letourneau*, 1991 ABCA 309 at ¶ 6; *R v Pitkeathly*, 1994 CanLII 222, (1994), 69 OAC 352 at ¶ 13.

[47] However, that is not the case with Mr Falcitelli: his PSR and treatment records found at tabs 12-16 of Exhibit 7 describe his proactive approach to clinical treatment, and he is actively engaged with a mutual-aid group in the community.

Mental health as a mitigating factor

[48] Mr MacRae's PSR refers to a clinical diagnosis of PTSD; this appears to have developed from a profoundly traumatising adverse childhood experience. Exhibit 5 is a report from his attending psychiatrist, which offers the opinion that "the PTSD is the underlying reason that Tyler responded as he did in the situation that resulted in him being charged"; the report also describes Mr MacRae as meeting the criteria for a number of other mental-health conditions

[49] It would be an error to conclude that a person with a mental illness inherently is more likely to commit acts of violence or engage in criminal conduct. This is an unfounded stereotypical notion that was identified in *Winko v British Columbia (Forensic Psychiatric Institute)*, 1999 CanLII 694 (SCC), [1999] 2 SCR 625 at ¶ 35-38.

[50] However, when there is a proven link between a mental illness and a person's offending conduct, that connection may operate as a mitigating factor, in the sense of reducing moral culpability: see *R v Hood*, 2018 NSCA 18 at ¶ 180, aff'g 2016 NSPC 78; *R v Friesen*, 2020 SCC 9 at ¶ 91.

[51] In this case, I find the link between Mr MacRae's criminal conduct and his mental-health diagnosis to have been unproven for two reasons. First, the qualification of the author of the report as an expert capable of rendering an opinion on the point was not established as required by *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23. Second, even if I were wrong on that point, there is nothing in the opinion prepared by the psychiatrist that identifies the evidence that she relied upon in developing it. A forensic opinion is only as good as the evidence on which it is based: *R v Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 SCR 852 at ¶ 72.

Seriousness of the offence

[52] As described earlier, Mr Fraser suffered significant, long-lasting physical injuries that have jeopardized his livelihood; his victim-impact statement [VIS] describes the importance of unimpaired vision to his employment. I am satisfied that the prosecution has proven to the beyond-a-reasonable-doubt standard required in ¶ 724(3)(e) of the *Code* that the conduct of Mr Falcitelli and Mr MacRae has

had a significant impact on Mr Fraser, engaging the aggravating factor in ¶ 718.2(a)(iii.1) of the *Code*.

[53] There is an additional community-impact element. Serious injuries require extensive medical intervention. Mr Fraser required emergency medical intervention and major surgery. It is important to recall that, although we enjoy in Canada a public-health system that covers costs of hospital care, it is a cost that is borne by the public, and it is substantial. It is unacceptable that law-abiding members of the public should be required to shoulder the healthcare costs arising people choosing to settle their disputes through violence.

Moral culpability of Mr Falcitelli and Mr MacRae

[54] Mr Falcitelli and Mr MacRae are solely responsible for their actions; I would not give effect to the argument that Mr Fraser ought to be taken as somehow to blame for what they did to him. First, as a matter of law settled over thirty years ago, a person cannot consent to bodily harm: *R v Jobidon*, 1991 CanLII 77 (SCC), [1991] 2 SCR 714; it would be a poor policy that would allow vitiated consent to somehow lessen moral culpability in circumstances such as this case.

[55] Second, it is important to observe that when Mr Falcitelli was repeatedly kicking Mr Fraser, and Mr MacRae was raining down punches on him, Mr Fraser

was down and out—he was in no position to defence himself. There is nothing to dilute the moral culpability of Mr Falcitelli and Mr MacRae.

Prospects for rehabilitation

[56] The PSRs for Mr Falcitelli and Mr MacRae satisfy me that they are excellent candidates for rehabilitative sentences. Their educational and employment histories speak of solid pro-social values. Furthermore, they have agreed to pay restitution to Mr Fraser. They have been bail compliant. They have strong family and community supports.

Sentence parity

[57] Counsel filed a number of reported sentencing decision with the Court.

Submitted by the prosecution

- *R v MacLean*, 2017 NSPC 34
- *R v Ordway*, 2023 BCSC 1624
- *R v Laite*, 2023 CanLII 460 (NLPC)
- *R v Power*, 2016 NSPC 30
- *R v Himmelman*, 2024 NSSC 411
- *R v Power,* 2022 NLSC 167

Submitted by counsel for Mr Falcitelli

- *R v Croteau*, 2015 ABPC 142
- *R v Adamson*, 2017 ONCJ 174
- *R v Munro*, [1994] NSJ No 693
- *R v Auclair*, 2006 QCCQ 7093
- *R v Willett*, 2017 ABPC 68
- *R v Ranspot*, 2017 BCPC 101

Submitted by counsel for Mr MacRae

- *R v Sellars*, 2013 NSCA 129
- *R v Espinosa Ribadeneira*, 2019 NSCA 7 [*Espinosa Ribadeneira*] A university student was intoxicated by beverage alcohol. He unlawfully entered two separate apartments and assaulted the occupants. One assault was a knife attached ; the other led to injuries being suffered by a female victim who had been asleep in her bed. The NSCA affirmed a 3-year conditional discharge.

[58] In addition to those, I have found the following to be useful comparators:

- *R v MacDonald* (12 June 2003), Case 1263407 (NSSC): charge of assault causing bodily harm; victim made sexualized comments to offender,

who responded with uncharacteristic violence; victim suffered life-threatening injuries, required artificial ventilation, gastric intubation and reconstructive surgery; suspended sentence with a two-year term of probation imposed following a contested sentencing hearing.

- *R v Pottie,* 2013 NSCA 68: charge of ¶ 267(b); serious assault upon a co-worker which resulted in victim suffering a swollen eye, sore chest, and three separate fractures of facial bones; 16-month suspended sentence affirmed on appeal.

- *R v Barrons*, 2017 NSSC 216: a home-invasion break and enter which included intimate-partner assault. Home-invasion break-ins with significant violence usually carry significant penitentiary terms—eight to ten years would not be uncommon: *R v Harris*, 2000 NSCA 7 at ¶ 57-62. In imposing a three-year suspended sentence upon Barrons, the sentencing judge affirmed, at ¶ 39-46, that suspended sentences may have a significantly deterrent effect; there is appellate level support for this: see *R v TS*, 1996 CanLII 5297 (NSCA), [1996] NSJ No 242 at ¶ 28; *R v Bursey*, 1991 CanLII 2576 (NSCA), 104 NSR (2d) 94 at 97. This proposition has regained currency since the decision in *R v Rushton*, 2017 NSPC 2 at ¶ 95.

Sentence of the Court

[59] I find that the imposition of conditional discharges in this case would be in the interests of Mr Falcitelli and Mr MacRae: discharges would not encumber them with criminal records that could work as obstacles to obtaining or continuing employment, and would allow them to focus on getting restitution paid to Mr Fraser. Discharges would not be contrary to the public interest: as the terms of the discharges will be substantial, they will take into account the sentencing imperatives of denunciation and deterrence; further, as Mr Falcitelli and Mr MacRae are unlikely to engage in further criminal activity, the public will not require protection from them. Finally, discharges would be consistent with the outcome in *Espinosa Ribadeneira.*

[60] The Court will discharge Mr Falcitelli and Mr MacRae upon conditions set out in a checklist which I have provided to the clerk of the Court and have been read into the record, including restitution conditions.

[61] The Court imposes primary-designated-offence-DNA-collection orders, and 10-year/lifetime § 109 prohibition orders (with a § 113 order in relation to Mr Falcitelli authorizing the CFO to issue to Mr Falcitelli an authorization, license or registration certificate for employment purposes). Mr Falcitelli and Mr MacRae will each be assessed $200 victim-surcharge amounts with 6 months to pay.

[62] This case arises because of poor decision-making.

[63] However, there were at least two individuals who exercised good judgment. One was the person who appeared to be a doorman and tried to break things up.

[64] The second was the female in the black jumpsuit. On several occasions, she fended off Mr Falcitelli and Mr MacRae, and likely protected Mr Fraser from being more badly hurt than he was. Her actions were heroic.

[65] I thank counsel for their submissions.

Atwood, JPC