SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Lilly*, 2022 NSSC 276

Date: 20221003
Docket: CRH 507902
Registry: Halifax

Between:

Her Majesty the Queen

v.

Jacob Matthew Lilly

DECISION ON SENTENCE

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	October 6 and 8, 2021; February 11, March 25 and April 14, May 17, July 20, 2022 in Halifax, Nova Scotia
Counsel:	Rick Woodburn, for the Crown Ian Hutchison, for the Defence

By the Court:

Introduction

[1] I found Mr. Lilly guilty (2022 NSSC 138) that he:

> On or about the **31st day of March 2021**, at or near Dartmouth Nova Scotia, did without lawful authority, engage in conduct with the intent to provoke a state of fear in Corrections Officer Matthew Hicks, a justice system participant, in order to impede him in the performance of his duties, contrary to **section 423.1(1)(b) of the *Criminal Code***.

[2] Now it falls to me to sentence him.

[3] The maximum sentence of imprisonment for this offence is 14 years.

[4] A fit sentence in this case is 25 months in custody to be served consecutively to any present sentence being served by Mr. Lilly.

Background

[5] **On December 2, 2019**, Mr. Lilly was on remand at the Central Nova Scotia Correctional Facility, aka "Burnside Jail", for outstanding charges from July 7, 2019, – sections 267(a) - assault with a weapon; s. 268 - aggravated assault; and s. 239 - attempted murder.[1]

[1] On July 18, 2022, Mr. Lilly plead guilty to a charge from the July 7, 2019, incident. He is scheduled to be sentenced on November 10, 2022, in Dartmouth Provincial Court. Mr. Lilly has also been convicted of aggravated assault in relation to his involvement in a December 2, 2019, incident at the Burnside Jail. That sentencing has not taken place, as the Crown has given notice of its intention to have him declared a dangerous offender.

[6] On **March 31, 2021**, Mr. Lilly remained incarcerated at the Burnside Jail, pending his trial in relation to the events of **December 2, 2019**, regarding the attack on inmate Stephen Anderson in his cell by up to 7 inmates, which trial was scheduled for **May 2021**.[2]

[7] Correctional Officer Hicks was subpoenaed to testify at the May 2021 trial.

[8] I concluded that Mr. Lilly committed the offence under s. 423.1 *CC* in relation to Correctional Officer Hicks with the intention to impede him in the performance of his duties as a correctional officer at the Burnside Jail *and* in the performance of his duties as a subpoenaed witness in relation to the trial regarding the December 2, 2019, incident involving Stephen Anderson, which trial was scheduled to start in May 2021.[3]

[9] Justice Jamie Campbell found each of the offenders guilty of one or more criminal offences in relation to the injuries suffered by inmate Stephen Anderson (in

[2] The May 2021 trial was ultimately adjourned.

[3] The May 2021 scheduled trial related to an incident that had taken place inside the Burnside Jail on December 2, 2019, when one inmate was savagely attacked by seven others, who were emboldened, and in some cases assisted, by eight others. Ultimately 15 inmates were charged. This group of offenders came to be known as the "Burnside 15". Mr. Lilly was one of the 15 inmates. Correctional officers were prevented from rendering assistance to the injured inmate. Correctional Officer Matthew Hicks was working and present on the floor of the range in question when this attack took place. He stood in close proximity to and had interaction with Mr. Lilly during that time.

R. v. Ladelpha, 2021 NSSC 324, he dealt with some of the offenders who proceeded by way of trial):

> 96 Each of the accused is not guilty of attempted murder.
>
> Aggravated Assault – Section 268(1) of the Criminal Code
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> 97 All of the accused are charged with committing aggravated assault. Aggravated assault involves an assault by which the person is wounded, maimed, disfigured, or has their life endangered. To be convicted of the offence the person does not have to have intended to wound or disfigure or endanger the life of the other person. They must only have intended to assault them with the "objective foresight of bodily harm". R. v. Godin, [1994] 2 SCR 484. The offence is proven if the assault has the consequence of wounding, maiming, disfiguring, or endangering the life of the other person in circumstances in which it is reasonable to foresee the infliction of bodily harm.
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> 98 It has been proven beyond a reasonable doubt that the assault on Stephen Anderson involved at the very least wounding. He was beaten when attacked by several men in a confined space. Anyone involved in the plan to have one person assaulted in a cell by a group of 7 others, behind a door held closed, over a period of time permitted by preventing correctional officers from intervening, could not have reasonably foreseen anything less than bodily harm. It is not reasonable to infer that the intent of the plan was simply to assault Mr. Anderson in a way that involved a use of force that did not extend to causing bodily harm. Those involved need not have precisely calibrated the anticipated level of bodily harm. There is a broad range of injuries within the scope of bodily harm. But when bodily harm would be reasonably foreseen, and the person is wounded, that is an aggravated assault.
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> 99 **The assault was undertaken as part of a coordinated effort or joint enterprise that had been planned minutes before. While the words spoken by Mr. Marriott and Mr. Lilly at the telephones do not support the inference of an intent to kill, they could be interpreted as the start of plan to assault Stephen Anderson**. The "co-conspirators' exception to the hearsay rule" may apply in prosecutions for substantive offences alleged to have been committed in concert. The safer course however is to not make use of them in determining whether there was a plan. The existence of a plan to assault Stephen Anderson can be reasonably inferred from the gathering in Cell 28 and the coordinated actions of those involved leading up to the assault. Those involved in giving effect to that plan were working together toward a purpose. Section 21(1) of the Criminal Code makes anyone a party to an offence if they actually commit the offence, do anything to aid the person committing it or "abet" the person committing the offence. To abet includes encouraging, instigating, promoting or procuring the crime.
>
> …

106 **Mr. Lilly and Mr. McIntosh held the door while those inside assaulted Stephen Anderson. They were aiding in the commission of the offence. They could see the offence taking place and their part in facilitating it was to prevent Mr. Anderson from leaving and to prevent correctional staff from intervening.** Mr. McIntosh was not part of the gathering in Cell 28. But he could clearly see what was happening inside Cell 8 and was an active participant in holding the door shut then opening it for Mr. Carridice to enter. **Mr. Lilly and Mr. McIntosh are guilty as parties to the offence of aggravated assault.**

Obstruction - Section 129(a) of the Criminal Code

111 All those named on the indictment have been charged with obstructing the correctional officers engaged in the lawful execution of their duties.

112 The officers who responded to the scene were functioning in the lawful execution of their duties.

113 **Mr. Lilly was one of the inmates who stood in front of the cell area and impeded the access to that area by the correctional officers. He can be seen on the video forming part of a group that clearly had as its purpose preventing the officers from getting to Cell 8 to intervene. The officers could theoretically, have deployed pepper spray (OC spray) or started to push inmates out of the way. That could have resulted in making matters worse and the judgement exercised was to use other means of moving the inmates first. But they were clearly obstructed by Mr. Lilly and some others. Mr. Lilly is guilty of the offence of obstruction.**

114 **The circumstances of this event make it unusual. Mr. Lilly was found guilty as a party to the aggravated assault, in part because he held the cell door closed but also because he blocked access to the cell by correctional officers. A person inside the cell with Mr. Anderson would also be convicted of aggravated assault. It would not be fair to face conviction on two criminal offences based on his level of involvement in the same incident. A stay will be entered with respect to the obstruction charge.**

115 **The other inmate on this indictment who was outside the cell for some of the time when the assault was taking place was Mr. McIntosh. He came down to Cell 8 and held the door closed with Mr. Lilly. He went into the cell around 7:49:39 and is in for about 10 seconds. He walked away from the crowd and watched as the other inmates blocked the correctional officers. He did not participate in that.**

116 **It is difficult to see how Omar McIntosh could be found guilty of obstruction when what he did was participate in the assault and unlawful confinement.** His actions did not make him a party to the offence of obstruction. He did nothing to obstruct the officers and did nothing to assist others in the obstruction of officers. After holding the cell door, he moved away and remained on the periphery.

…

Assault of Correctional Officer - Section 270(1)(a) of the *Criminal Code*

122 **Jacob Lilly is charged with the assault of Correctional Officer Matthew Hicks while Mr. Hicks, as a peace officer, was engaged in the lawful performance of his duties.**

123 **Correctional Officer Hicks was engaged in the lawful exercise of his duties when he responded to the incident on North 3. He said he was confronted by Mr. Lilly who saw him with his hand on his pepper spray cannister. He said that Mr. Lilly told him not to deploy it. He said that he felt his hand being swatted or batted away from the cannister.**

124 **Correctional Officer Hicks did not see Mr. Lilly himself strike him. He was the person with whom he was engaged at the time, but he could not say that it was Mr. Lilly who struck his hand. He allowed that his hand might have been hit by someone else, either intentionally or by accident. That does not establish proof beyond a reasonable doubt.**

…

127 ***Jacob Lilly*:**
Count 1: Conspiracy to commit murder - Not Guilty
Count 2: Attempted murder - Not Guilty
Count 3: Unlawful confinement - Not Guilty
Count 4: Aggravated assault - Guilty
Count 5: Assault with a weapon - Not Guilty
Count 6: Obstruction - Conviction Stayed
Count 7: Assault of a Peace Officer - Not Guilty

…

129 ***Omar McIntosh***:
Count 1: Conspiracy to commit murder - Not Guilty[4]

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[4] In his sentencing reasons, *R. v. Cox*, 2022 NSSC 200 Justice Campbell summarized the sentencing outcomes to date: "1 Kaz Cox is being sentenced for his part in the assault of Stephen Anderson at the Central Nova Scotia Correctional Facility in Burnside on December 2, 2019. He has been found guilty of aggravated assault. 2 After two trials 11 other people involved in that incident have also been found guilty of aggravated assault and one of obstruction. The person found guilty of obstruction has been sentenced, *R. v. Nagendran*, 2022 NSSC 14. Six of the people found guilty of aggravated assault have been sentenced, *R. v. Ladelpha*, 2021 NSSC 352, *R. v. McIntosh*, 2021 NSSC 351, *R. v. Clarke-McNeil*, 2022 NSSC 63, *R. v. Mitton*, 2022 NSSC 123, *R. v. Hardiman*, 2022 NSSC 198, and *R. v. Crawley*, 2022 NSSC 199. Mr. Ladelpha was sentenced to 6 years, Mr.

Count 2: Attempted murder - Not Guilty
Count 3: Unlawful confinement - Not Guilty
Count 4: Aggravated assault - Guilty
Count 5: Assault with a weapon - Not Guilty
Count 6: Obstruction - Not Guilty

[10] Justice Jamie Campbell, who presided over the entirety of those proceedings, said in sentencing one offender who pleaded guilty (*R. v. Marriott*, 2022 NSSC 53):

> 1 Brian James Marriott has pleaded guilty to aggravated assault arising from an incident at the Central Nova Scotia Correctional Facility in Burnside on December 2, 2019. Two trials were held in 2021 for 13 others: *R. v. Ladelpha*, 2021 NSSC 324 and *R. v. Mitton*, 2021 NSSC 325.
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> 2 **Of the 13 people who participated in the trials related to this incident, 12 were found guilty of aggravated assault and one was found guilty of obstruction.** While Mr. Marriott pleaded guilty and has admitted to the essential elements of the offence of aggravated assault as set out in an Agreed Statement of Facts, he does not agree with how the Crown has characterized the circumstances of his involvement in the commission of the offence. That is relevant to sentencing.
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> …
>
> 32 **The Crown seeks to establish Mr. Marriott's leadership of the plan by pointing first to the comments he made to Jacob Lilly. Mr. Marriott appears at least, to have "got the ball rolling". Once he spoke to Mr. Lilly, Mr. Lilly immediately went into action in getting inmates together in Cell 28.** What Mr. Marriott said was to take care of something, and to get 4 or 5 guys together. Mr. Lilly succeeded in getting 11 guys together in Kaz Cox's cell. In that sense, if Mr. Lilly were following Mr. Marriott's instructions, he did not follow them exactly.
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> 33 **The words spoken to Jacob Lilly do not convey what was intended to be done. They do not intimate violence. Taking care of something could mean almost anything.** What happens afterward must be put together with those words to provide the full context. Mr. Anderson was assaulted. **And what taking care of it meant might be inferred from what happened minutes later.**
>
> …

McIntosh to 5 1/2 years, Mr. Clarke-McNeil to 6 years, Mr. Mitton to 6 years, Mr. Hardiman to 6 years, and Mr. Crawley to 5 years."

> 37 Apart from the words spoken to Jacob Lilly, Mr. Marriott's actions were not of a kind different from those of others who were involved such that they would allow for the inference that he was a leader of the group. And the words spoken to Mr. Lilly may permit the inference that Mr. Marriott was taking this on as his issue, but they may also be inferred to mean that what Mr. Marriott had in mind before going into Cell 28 was something of a less violent nature. The plan was developed in Cell 28 but that does not mean that the plan was one dictated by, proposed by, or led by B.J. Marriott.
>
> Conclusion
>
> 38 **There was a plan. There is no reasonable inference other than that, the plan involved causing bodily harm to Stephen Anderson. The plan was to hurt him. The result was that he was wounded, and his life was endangered. That is aggravated assault.** That is what Mr. Marriott has pleaded guilty to. It is not necessary to prove that the plan involved endangering the life of Stephen Anderson and no finding has been made in that regard.
>
> 39 The wounds to Mr. Anderson indicate that a weapon was used. There was no evidence about who used any weapon or about which of the inmates knew that a weapon was to be used.
>
> 40 B.J. Marriott was involved in the plan. It has not been proven beyond a reasonable doubt that he was the leader or a leader in the preparation or carrying out of the plan.

[11] Justice Campbell's various statements regarding the events of December 2, 2019, are relevant insofar as they give some indication of what sentence Mr. Lilly might expect for those offences, and also gives context to Mr. Lilly's involvement in those offences.

[12] Regarding the circumstances of March 31, 2021, in convicting Mr. Lilly I stated:

> 21 The allegation is that Mr. Lilly and the other inmates were outside their cells when CO Hicks and CO Whynot were among them (between their shift start at 6:45 PM and 10:00 PM - the inmates are usually locked in their cells between 10:00 PM and 9:00 AM, and I am satisfied that this was also the case at the material times herein) when Mr. Lilly, while

approximately 50 feet away from CO Hicks, sufficiently loudly stated, such that the inmates and CO Hicks and CO Whynot could hear his words, including, according to CO Hicks at different points in his testimony:

1. Stop testifying - why you snitching on the crew? or

2. Stop snitching - why you testifying on the crew? or

3. Stop snitching on the crew - why you testifying? or

4. Why you snitching? - stop testifying on the crew.

22 As I noted elsewhere, I accept that CO Hicks was able to recognize Mr. Lilly's voice among others, because it stands out and is distinctive, and CO Hicks had sufficient contact with Mr. Lilly in the institution to give this evidence the necessary weight to conclude it so beyond a reasonable doubt.

23 CO Whynot testified that what he recalled Mr. Lilly say was captured by the following phrases: "Don't testify"; "Stop snitching on the crew"; and "Stop being a snitch".

24 He characterized Mr. Lilly speaking:

> Loud enough that I could hear it on the other side of the day room... I could hear it clearly from the other side... *I did visually observe him say it- I also know his voice and I do recognize him from working there*... since I got hired in January 2020 and I hit the floor on March 2020.

…

38 **I am satisfied beyond a reasonable doubt that Mr. Lilly intended to provoke a state of fear in CO Hicks and intended to impede him in the performance of his duties (whether that be as a correctional officer at the institution or as a witness at the trials of any of the Burnside 15 accused).**

…

45 CO Whynot testified that to him, Mr. Lilly's words meant to convey to the other inmates that CO Hicks was a snitch, and that the effect thereof for a correctional officer is that "it can cause fear and anxiety" and makes it harder to deal with inmates for that correctional officer. He also characterized the words "as a threat" referencing the "snitches get stitches" saying common in the criminal subculture.

46 I bear in mind that Mr. Lilly yelled these statements such that inmates and correctional officers alike could clearly hear them. CO Hicks testified that he considered it, "a shot at me with the ongoing [Burnside 15] trial that was coming [May 2021] ... I felt he was trying to pressure on me not to testify."

47 CO Hicks was also asked about whether he felt threatened thereby. He did consider the words "as a threat" intended to make him "not testify"9.

48 He confirmed that not "snitching" is shorthand for "don't tell what happened"; and more specifically "don't testify or there will be repercussions [to him]".

49 As to who is "the crew", he stated that "I believe it was intended [to be a reference to] the other individuals that are being charged on the same offences [the Burnside 15 who had been charged in relation to the violence against the inmate on December 2, 2019, at Burnside Jail]".

50 **In essence, CO Hicks understood Mr. Lilly's statements to amount to the following threat: if you testify against us [the Burnside 15] you will be at risk of injuries when you are working and when you are outside the institution.**

…

54 CO Hicks was present when the Burnside 15 collectively participated (to a lesser or greater degree) in the incident on December 2, 2019. Mr. Lilly actively prevented CO Hicks from reaching the cell of the injured inmate.

55 The incident demonstrated that the members of the Burnside 15 were prepared to act collectively, with the result that they were consequently charged with criminal offences. Thereafter, they were referred to in the press and in court as "the Burnside 15"11.

56 Mr. Lilly's statements on March 31, 2021, speak for themselves in plain language.

Per CO Hicks

- "Stop testifying - why you snitching on the crew?" or
- "Stop snitching - why you testifying on the crew?"
- "Stop snitching on the crew - why you testifying?" or
- "Why you snitching? - stop testifying on the crew".

Per CO Whynot

- "Don't testify";
- "Stop snitching on the crew";
- "Stop being a snitch".

57 I am satisfied beyond a reasonable doubt that the references to "the crew" are to the members of the Burnside 15. **CO Hicks was a subpoenaed witness, for the May 2021, trials which were scheduled for the Burnside 15 members.**

58 I am satisfied beyond a reasonable doubt that Mr. Lilly intended that his statements should be taken seriously by CO Hicks and to provoke a state of fear in CO Hicks such that he would not testify at all, or if so, only in a manner favourable to the interests of the Burnside 15.

[13] Let me next briefly examine the offence for which Mr. Lilly is to be sentenced.

The relevant legislative provisions of the offence

[14] Section 423.1 of the Criminal Code [“CC”] reads:

(1) **No person shall, without lawful authority, engage in any conduct with intent to provoke a state of fear in**

(a) **a group of persons or the general public in order to impede the administration of criminal justice**;

(b) **a justice system participant or military justice system participant in order to impede him or her in the performance of his or her duties**; or

(c) **a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization**.

[15] “Justice system participant” is defined in s. 2 of the *Criminal Code*:

"**justice system participant" means**

(a) **a member of the Senate, of the House of Commons, of a legislative assembly or of a municipal council,**

(b) **a person who plays a role in the administration of criminal justice, including**

(i) the Minister of Public Safety and Emergency Preparedness and a Minister responsible for policing in a province,

(ii) a prosecutor, a lawyer, a member of the Chambre des notaires du Québec and an officer of a court,

(iii) a judge and a justice,

(iv) a juror and a person who is summoned as a juror,

(v) an informant, a prospective witness, a witness under subpoena and a witness who has testified,

(vi) a peace officer within the meaning of any of paragraphs (b), (c), (d), (e) and (g) of the definition "peace officer",

(vii) a civilian employee of a police force,

(viii) a person employed in the administration of a court,

(viii.1) a public officer within the meaning of subsection 25.1(1) and a person acting at the direction of such an officer,

(ix) an employee of the Canada Revenue Agency who is involved in the investigation of an offence under an Act of Parliament,

(ix.1) an employee of the Canada Border Services Agency who is involved in the investigation of an offence under an Act of Parliament,

(x) an employee of a federal or provincial correctional service, a parole supervisor and any other person who is involved in the administration of a sentence under the supervision of such a correctional service and a person who conducts disciplinary hearings under the *Corrections and Conditional Release Act*, and

(xi) an employee and a member of the Parole Board of Canada and of a provincial parole board, and

(c) **a person who plays a role in respect of proceedings involving**

(i) security information,

(ii) criminal intelligence information,

> (iii) information that would endanger the safety of any person if it were disclosed,
>
> (iv) information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization,
> or
>
> (v) potentially injurious information or sensitive information as those terms are defined in section 38 of the *Canada Evidence Act*;

[16] A related provision, **Section 423** [**Intimidation**] *CC* makes it an offence to "wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing…".

[17] Upon conviction under **s. 423** one is liable to imprisonment for a term of **not more than five years** imprisonment.

[18] Upon conviction under **s. 423.1 [intimidation of a justice system participant or a journalist]** one is liable to imprisonment for a term of **not more than 14 years**.

[19] Mr. Lilly faces a 14-year maximum term of imprisonment. Parliament has clearly indicated it considers offences under section 423.1 to be considerably more serious than those under section 423 *CC*.

[20] Therefore, generally speaking, when considering what are the range of fit sentences for offences under section 423.1 *CC*, sentencing decisions dealing with section 423 are of very limited use.

The sentencing recommendations of the Crown and Mr. Lilly

[21] The Crown argues for a sentence between 2 to 3 years' imprisonment, to be served *consecutively* to any present sentences being served per s. 718.3(4) (a) *CC*.

[22] Mr. Lilly argues for a sentence of 1 year imprisonment to be served *concurrently*, arguing that the phrase "shall consider directing" per s. 718.3(4) *CC* "does not mandate that a consecutive sentence be imposed… "[because such] best achieves the sentencing principle of totality of sentence... [otherwise]… sentencing Mr. Lilly to a three year consecutive term of imprisonment… means that Mr. Lilly will be serving a total sentence of five years imprisonment. Such a sentence is excessive in the circumstances and has a crushing effect upon any prospects of rehabilitation for Mr. Lilly. In the circumstances, given Mr. Lilly's young age, the factual circumstances of the case before the court and that Mr. Lilly awaits sentence before other courts for other offences, the most appropriate sentence is a concurrent term of imprisonment. Finally, as noted in *R. v. Keats*, 2018 NSCA 16, Mr. Lilly's subsequent conviction for assault causing bodily harm [in New Brunswick] is not an

aggravating factor but is relevant to the court's exercise of discretion to impose a concurrent or consecutive sentence. Mr. Lilly submits that the facts for his conviction for assault causing bodily harm albeit committed in the federal correctional system, are very different from the facts of the case before the court. In such circumstances that this conviction does not favour the imposition of a consecutive sentence."

[23] He does *not* seek a remand credit as he has been serving sentences or otherwise given credit throughout the relevant time period regarding the section 423.1 *CC* charge herein.

[24] The parties agree that the mandatory ancillary orders pursuant to sections 109 and 487.051 *CC* are appropriate.

Mr. Lilly's criminal record, sentences presently being served, and circumstances[5]

[25] Mr. Lilly was born November 24, 1997. He turned 18 years of age on November 24, 2015.

[26] He remains a young man.

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[5] Mr. Lilly is still pending sentencing on his conviction for aggravated assault (the obstruction conviction was stayed by the court) arising from the December 2, 2019, incident in Burnside jail on November 30, 2021 - see *R. v. Ladelpha*, 2021 NSSC 324 per Campbell, J. As noted, the Crown is seeking to have him declared a "dangerous offender".

[27] However it came to be, he has had a turbulent childhood and a criminal record starting with offences committed when he was just 13 years of age.

[28] At the age of 16 years, he was sentenced to 450 days (300 custody and 150 under supervision). That would have provided him significant access to rehabilitative programs.

[29] However, thereafter he continued to incline to criminal behaviour, and showed little interest in more pro-social behaviour.

[30] **As a youth,** his first convictions (for assault with a weapon, and possession of a weapon for a purpose dangerous to the public /sections **267(a) and 88** *CC*) were committed on March 11, 2011, for which he was sentenced to Community Service on February 13, 2013.

[31] He was sentenced June 26, 2014, to 450 days custody and community supervision, and 9 months probation.

[32] This sentence was for offences contrary to sections **95(1)** *CC* - possession of a loaded prohibited or restricted firearm or unloaded prohibited or restricted firearm together with readily accessible ammunition (January 10, 2014); and **92(2)** *CC* - possession of a prohibited firearm, weapon, device or ammunition; **268** - aggravated

assault; **279(2)** - unlawful confinement; and **344** - robbery; all occurring between February 28 and March 3, 2014.

[33] **As an adult,** on October 4, 2016, he was sentenced to 30 months in custody for having committed a robbery (s. **344** *CC*) and s. **267(1)(b)** assault causing bodily harm on June 3, 2016.

[34] In New Brunswick, Mr. Lilly was sentenced to two years custody on April 13, 2022, with no remand credit, after he pleaded guilty to assault causing bodily harm (s. **267(b)**) occurring in **December 2018**, regarding a group inmate assault on another inmate in jail at the Atlantic Institution, federal penitentiary at Renous, New Brunswick.

[35] I am advised by counsel that on July 18, 2022, he pled guilty in Dartmouth Provincial Court to an assault causing bodily harm offence (s. **267(b)**) arising on **October 5, 2020**. The sentencing has not yet taken place.

[36] His sentencing for the **December 2, 2019**, aggravated assault on Stephen Anderson is still pending as well.

[37] His counsel argues that although deterrence and denunciation are the primary considerations in sentencing offenders who commit s. 423.1 *CC* offences, the court should not lose sight of rehabilitation because Mr. Lilly is a youthful offender, and

that the court should act with restraint, and impose no more of a sentence than is reasonably necessary to achieve deterrence, denunciation, and as short a period of custody as is consistent with any need for his separation from society.

[38] I have reviewed both the June 22, 2022, update to, and his Pre-Sentence Report [“PSR”] dated February 10, 2022. Overall, in light of all the circumstances. I find these reports to be a fragile foundation to reliably conclude that Mr. Lilly is presently sufficiently motivated to actively pursue his rehabilitation.

[39] As of January 18, 2022, the author of his PSR concluded: “Mr. Lilly… has acknowledged responsibility for his actions but did not display any victim empathy. Mr. Lilly has completed the Options to Anger program while incarcerated but advised he is not interested in pursuing any other type of counselling.” I recognize that very little programming is available in the provincial correctional institutions, and Mr. Lilly may have made this comment to the writer with that reality in mind. On the other hand, Mr. Lilly also then knew he was going to be to be sentenced for the December 2, 2019, aggravated assault, and that he should expect a federal penitentiary sentence. Without a positive expression that he is willing and prepared to throw himself into rehabilitation-oriented endeavours, I conclude he is not so motivated. The June 22, 2022, update to that PSR noted that “there have been no changes in respect to the report written by Probation Officer Dawn Gillis for

sentencing on February 10, 2022. As there have not been any significant changes with respect to the majority of the matters discussed [in the earlier PSR], this letter will bring the court abreast of Mr. Lilly's situation to present."

[40] Nevertheless, the fact that Mr. Lilly is only 24 years of age still provides some basis that his hoped-for rehabilitation can yet be effected.

Victim Impact

[41] While no victim impact statement was filed, the trial evidence did provide references to the impact specifically on Correctional Officer Hicks.

[42] Firstly, he testified albeit reluctantly, that he was required to take time off after the December 2, 2019, incident at Burnside Jail.

[43] He added that after returning to work as a Correctional Officer at Burnside Jail he again had to take time off as a result of the lingering effects of that incident.

[44] He testified at trial that he took the threats spoken by Mr. Lilly seriously - both when he was working inside the jail and if/when he is outside the jail.

[45] It should not be forgotten what Justice Cory stated in *R. v. McCraw*, [1991] 3 S.C.R. 72, regarding whether a s. 264.1 *CC* threat to "rape" a female, was one that

could cause "serious bodily harm" (some offences inherently have potential to cause greater psychological harm):

> The Aim of Section 264.1(1)(a)
>
> 24 Parliament, in creating this offence recognized that **the act of threatening permits a person uttering the threat to use intimidation in order to achieve his or her objects.** The threat need not be carried out; the offence is completed when the threat is made. **It is designed to facilitate the achievement of the goal sought by the issuer of the threat. A threat is a tool of intimidation which is designed to instill a sense of [page82] fear in its recipient. The aim and purpose of the offence is to protect against fear and intimidation.** In enacting the section Parliament was moving to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society.

[46] Correctional Officer Hicks' evidence, in combination with a reasonably drawn inference here that Mr. Lilly's threats did cause Correctional Officer Hicks to have significant ongoing levels of real anxiety and fear, especially while at work as a Correctional Officer (in particular at Burnside Jail), arising primarily from the December 2019 incident, but also exacerbated by the intimidation directed to Correctional Officer Hicks on March 31, 2021, leads me to be satisfied beyond a reasonable doubt that this aggravating fact has been established here.

What is an appropriate sentence in the circumstances?

1-The governing legal principles

[47] I adopt what I stated in *R. v. Steed*, 2021 NSSC 71:

> 169 As Justice Wood (as he then was) stated in *Perry*:

"Applicable Principles

57 The general purpose of sentencing is found in s. 718 of the *Code*, which states:

Purpose and Principles of Sentencing

Purpose

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.

58 The sentencing exercise involves a balancing of the objectives set out in this section.

59 Section 718.1 of the *Code* requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 identifies specific sentencing principles which must be considered, including the following:

1. The sentence should be increased or reduced to account for any relevant, aggravating or mitigating circumstances relating to the offence or the offender.

2. The sentence should be similar to sentences imposed on similar offenders for similar offences, committed in similar circumstances.

3. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.

4. All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders.

60 Where an offender is being sentenced for multiple offences the court must consider whether any terms of imprisonment are to be served consecutively. In some circumstances the *Code* makes consecutive sentences mandatory (see for example s. 85(4)). In the absence of such a direction in the *Code*, the question will be resolved by a determination of whether

there is a sufficiently close connection among the offences to make concurrent sentences appropriate. If the offences arise out of a single event or transaction, concurrent as opposed to consecutive offences would typically be imposed…..

[48] Also relevant here are (since the Crown seeks a consecutive sentence and the Defence seeks a concurrent sentence):

s. 718.02 "When a court imposes a sentence for an offence under…paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.";

s. 718.2 (c) "Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;" and

s. 718.3 (4):

"The court that sentences an accused shall consider directing

(a) *that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing*; and…

[49] This section has been considered in *R. v. Keats*, 2018 NSCA 16 by Justice Van den Eynden:

25 The Crown points out that although the judge stated at ¶ 72 that he "considered, in arriving at the sentence to be imposed, the provisions of ss. 718 to 722 of the *Criminal Code*," he made no other reference to these sections, including s. 718.3(4), which is specific to Mr. Keats' sentencing. Section 718.3(4) provides:

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

(a) that the term of imprisonment that it imposes **be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing;** and

(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, including pending the determination of an appeal, or
> (iii) one of the offences was committed while the accused was fleeing from a peace officer.
>
> [Emphasis added]

26 **This section authorizes the judge to impose a new sentence consecutive to one already being served. Section 718.3(4) makes no mention of the relevancy of offence dates. Rather, under s. 718.3(4)(a), it is the date the sentence is imposed that is relevant — *not* the dates on which the underlying offences occurred.** As was evident in the judge's reasoning, his focus was incorrectly on the dates of the offences.

27 **The Crown contended that neither the wording of s. 718.3(4)(a) nor legal precedent supports the proposition that the time being served must be for a prior offence in order for a consecutive sentence to be ordered. The Crown argues the fact that Mr. Keats was a first-time offender for purposes of the sentencing was no bar to a consecutive sentence being imposed. I agree. This is a correct reflection of the law**.

[My bolding added]

[50] The court returned to explain this reasoning in *R. v. Campbell*, 2022 NSCA 29:

> **52** The Crown's third and final submission under this ground of appeal is that the judge erred in the application of the totality sentencing principle. The Crown argues:
>
> > [77] The third reason the sentencing judge imposed a concurrent sentence was because it was, in his view, "disproportionate" to impose a two-year custodial sentence, served consecutively, followed by three years' probation. The sentencing judge attempted to address the "disproportionate" impact of the total - or aggregate - sentence by making his sentence concurrent. ... **the failure to follow the accepted methodology to give effect to totality was an error in this case and ultimately resulted in a manifestly unfit (excessively lenient) sentence**.
> >
> > [Emphasis added]
>
> **53** I will first provide an overview of the totality principle and how it should be applied before setting out the judge's impugned methodology.

54 The principle of totality applies when consecutive sentences are imposed and ensures the aggregate sentence does not exceed the overall culpability of the offender. It serves to maintain the principle of proportionality. See *R. v. C.A.M.*, 1996 1 S.C.R. 500 at para. 42 and s. 718.2 of the Criminal Code which provides:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

55 Also, in the recent decision of this Court in R. v. Laing, 2022 NSCA 23, Justice Fichaud confirmed:

> [16] **In *R. v. Adams*, 2010 NSCA 42, para. 23, this Court adopted the methodology from *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, para. 42, per Lamer C.J.C. for the Court. That is - the judge sentencing for multiple offences should make three sequential determinations: (1) the sentence per offence apart from concurrency and totality, (2) whether the sentences should be concurrent or consecutive under the general principles of concurrency, and (3) whether the cumulative sentence should be reduced under principles of totality.**
>
> . . .
>
> [31] **From s. 718.2(c) and these authorities, clearly a determination that sentences be consecutive is a pre-condition to a reduction for harshness. The cumulative length of those consecutive sentences is the threshold to analyse the appropriate adjustment. Before entering the analysis of totality, the sentencing judge must determine which sentences would be consecutive or concurrent to which others under the general principles governing concurrency.**

56 When considering the totality principle, these factors are also important to keep in mind:

> • The principle does not entitle an offender to a reduction in sentence. Rather, **a reduction in the aggregate sentence arises if the total is crushing or exceeds the overall culpability of the offender**.
>
> **• The principle applies whether consecutive sentences are imposed at the same time or at different sentencing hearings.**
>
> **• Where a consecutive sentence is imposed at a different sentencing hearing, the remanet[5] must be considered. This ensures an offender's culpability is truly**

> **reflected in the aggregate sentence as the totality principle is not intended to reap benefits for additional crimes at discounted rates.**

See R. v. Johnson, 2012 ONCA 339, paras. 22-25, R. v. Park, 2016 MBCA 107, para. 14, and R. v. Tamoikin, 2020 NSCA 43, paras. 66-70.

> …
>
> [76] However, this also requires the court to consider the totality of making a proposed sentence consecutive to an existing sentence - including that **the combination of those sentences should not become disproportionate (s. 718.1 *CC*) or, as is sometimes said: "crushing" to the rehabilitative prospects of an offender.**

58 However, as the Crown correctly points out, the judge made no reference to, nor did his analytical path even remotely follow, R. v. Adams, 2010 NSCA 42. *Adams* required him, after having determined a fit and appropriate sentence, to have then considered whether that sentence should be served concurrently or consecutively to the remanet.[6]

…

71 Having summarized the parties' respective positions, the application of the *Adams* framework follows.

72 For the first step — what should the sentence be apart from concurring/consecutive and totality considerations?

…

77 Next, the second step — should the sentence be served concurrently or consecutively? It is obvious from my reasons a consecutive sentence is appropriate in this case. A concurrent sentence would stray from the general rule that separate offences warrant consecutive sentences

78 As noted, Mr. Campbell was being sentenced for a second serious sexual assault. Each offence involved a different victim. Each assault was separate in time. Only a consecutive sentence can address Mr. Campbell's wrongdoing and also properly emphasize denunciation and deterrence, as the sentence should.

79 Finally, the third step — should the sentence be reduced under principles of totality? In my view, no.

80 As explained in *Laing*:

> [27] By Stats. Can. 1995, c. 22, s. 6, Parliament added s. 718.2(c) to the *Criminal Code*.

> 718.2 Other sentencing principles - A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .
>
> (c) **where consecutive sentences are imposed**, the combined sentence should not be unduly long or harsh;

Section 718.2(c) subsumed what had been the judicial principle of totality.

[28] In *R. v. M.(C.A.)*, *supra*, Chief Justice Lamer for the Court summarized the earlier judicial principle:

> 42 ... The totality principle, in short, requires a sentencing judge **who orders an offender to serve consecutive sentences** for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:
>
> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and **each properly made consecutive in accordance with the principles governing consecutive sentences**, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

[29] In *R. v. Adams*, Bateman J.A. said:

> [23] In sentencing multiple offences, this Court has, almost without exception, endorsed an approach to the totality principle consistent with the methodology set out in *C.A.M.*, *supra* [*R. v. M.(C.A.)*, [1996] 1 S.C.R. 500]. ... The judge is to fix a fit sentence for each offence **and determine which should be consecutive and which, if any, concurrent.** The judge then takes a final look at the aggregate sentence. Only if concluding that
>
> the total exceeds what would be a just and appropriate sentence is the overall sentence reduced. ...
>
> [bolding added in original]

[51] While Mr. Lilly is correct that I am not *obligated* to direct a consecutive sentence, consecutive sentences in these circumstances are appropriate unless the

total sentence of consecutive sentences does exceed what is a just and appropriate sentence in the circumstances - in that case I must reduce the "aggregate sentence" to an appropriate level.

[52] I have borne these concerns in mind when choosing the length of sentence appropriate for the s. 423.1 *CC* offence.

2- What does the jurisprudence suggest is an appropriate sentence?

[53] I have examined all the cases presented by counsel (and have done some research of my own):

1. *R. v. Hopwood*, 2020 ONCA 608;
2. *R. v. Fensom*, 2014 ABQB 238 (see paras. 43-52 regarding range of sentences);
3. *R. v. Michel*, 2010 NWTTC 9;
4. *R. v. Heffernan*, [2014] NJ No. 84 (PC);
5. *R. v. Hammond*, 2016 ONCJ 176;
6. *R. v. Morrisseau*, 2017 SKQB 76 (albeit as a joint recommendation a sentence has less weight);
7. *R. v. Saddleback*, 2019 SKPC 42;
8. *R. v. Elliott*, 2021 NSSC 78;[6]
9. *R. v. Cameron*, (1991) 99 N.S.R. (2d) 376, 1990 CarswellNS 368 (CA) - during the preliminary inquiry hearing the offender made a pistol like a gesture to a Crown witness and was convicted for attempting to obstruct the course of justice under s. 139(2) *CC* (maximum 10 years imprisonment). The Court of Appeal stated: "[the offender was convicted on the main offence of theft and received eight months in custody and was sentenced to 18 months in custody consecutively for the attempted obstruction] it is clear from a review of [the witness' evidence that he did not it feel at all threatened by the gesture

[6] The circumstances of the offences and of the offender in this case are readily distinguishable, and I find it to be of no assistance.

> made toward him by [Cameron].… The learned sentencing judge, while acknowledging that the hand motion was not very threatening, put emphasis on the fact that it was done in a courtroom and the need to preserve the courtroom atmosphere… We have reviewed the relevant cases submitted by counsel dealing with **sentences for offences of obstructing the course of justice. They range from one day on the low end to three years on the high end.** We are of the opinion that the sentence of 18 months imposed… is clearly excessive, considering the innocuous nature of the threat and considering the sentences in other cases of attempting to obstruct the course of justice.… In our opinion, the recognized objectives of sentencing will be achieved by imposing a term of imprisonment of four months to be served concurrent to the eight months imposed for the theft conviction."

[54] A good starting point summary regarding such sentencings can be found in Provincial Court Judge Q.D. Agnew's decision in *R. v. Saddleback*, 2019 SKPC 42, which involved the intimidation of a witness:

> 1 On May 14, 2019, a particularly gruesome trial was occurring in Provincial Court in Saskatoon. Several persons were accused of confining a female complainant for several hours, torturing her and ultimately cutting off part of one of her fingers. As the episode was believed to be gang-related, there was a significant security presence in the courtroom.
>
> 2 During the complainant's testimony, the present accused, Ms. Saddleback, entered the courtroom in a noisy, disruptive fashion. She attempted to sit near one of the accused, who waved her off. Ms. Saddleback then left the courtroom, in a similar fashion. Once outside the courtroom, Ms. Saddleback was seen in the glass window of the courtroom door, looking at the complainant, who was still testifying. She waved her arms to attract the complainant's attention, and mouthed words to the effect that the complainant was lying. Ms. Saddleback then made eye contact with the complainant and drew her hand across her own throat in a slashing motion, several times. She then departed. (Note: these are the facts originally accepted by Ms. Saddleback. In her own remarks at the sentencing hearing, she resiled somewhat from them, although she did not resile from her admission of the essential elements of the charge.) She was thereupon arrested and, as she was being removed from the location, referred to the complainant several times as a "rat".
>
> …
>
> 15 Sentencing under s. 423.1(1) was recently considered in Saskatchewan in *R. v. Morrisseau*, 2017 SKQB 76 (Sask. Q.B.). In that case, the Court accepted a joint submission

for a period of 12 months' incarceration on the charge, consecutive to incarceration for certain charges related to a home invasion. The accused telephoned the victims of the home invasion, and had a note delivered to them, in an attempt to convince them not to testify.

16 A one-year period of incarceration, followed by a three-year period of probation, was ordered in *R. v. MacDonald*, 2005 CarswellNB 796 (N.B. Prov. Ct.), leave to appeal refused: 2006 NBCA 6 (N.B. C.A.). The accused made a threat to a witness in the court house prior to that witness testifying. In the courtroom during the testimony of another witness, he made a gun shape with his fingers and mimed shooting the witness. He approached a third witness during a break in the court proceedings, and made a further threat. He then made a number of threatening telephone calls. He alleged that the words and actions were not meant in the way they were received. The accused had a significant record, although he had had no convictions for three years prior to these incidents.

17 In *R. v. Michel*, 2010 NWTTC 9 (N.W.T. Terr. Ct.) [*Michel*], the accused attempted to intimidate a complainant into dropping charges against him. He was charged with a number of other offences relating to the same series of events, but specifically with respect to the charge of intimidation of a justice system participant, he was sentenced to 15 months in jail, followed by three years of probation. The sentencing judge made the following observations regarding the significance of this offence specifically with respect to a witness:

> [16] 'Justice system participant' is broadly defined in the *Criminal Code* to include many groups, witnesses and prospective witnesses being one of those groups. Many of the groups of participants that this section applies to, e.g. prosecutors, lawyers, officers of the court, even judges, play a role in the justice system, but their role is not confined to a specific case. If the intimidation of a member of one of those groups is successful, there is likely another member of the group that can step in and the process will continue - there will always be another prosecutor, another lawyer, another judge, another court officer. Intimidation of any of them while still a very serious crime will not necessarily frustrate a prosecution.
>
> [17] But if an accused successfully intimidates a *witness*, the result can be that the prosecution of that accused will be frustrated. Intimidation of a witness can result in significant damage to the administration of justice. When a matter is set for trial and a witness does not attend, or does attend but refuses to testify, or recants on a previous statement, and the prosecution is terminated, the community may well lose respect for and confidence in the criminal justice system. If the process is frustrated, a criminal charge will not be resolved on its merits. When an accused attempts to influence a witness to achieve such a result, there has to be meaningful consequences that will deter both the accused and others from such tactics and will express the court's and the community's condemnation of this conduct.

18 In *R. v. Hefferan*, 2014 CarswellNfld 93 (N.L. Prov. Ct.) [*Hefferan*], the accused accosted the complainant in public, yelling and screaming at her, as a result of the complainant having provided a statement to police regarding the accused's son. The

sentencing judge identified many positive circumstances relating to the accused: only one prior, unrelated offence on her record; a long-term relationship; a history of mental health and addictions issues; and a willingness to engage in treatment. The accused received a 90-day intermittent sentence and two years' probation as a global sentence for these actions as well as for a fraud and a breach of probation. The Court explicitly stated that this was "a very lenient disposition and one significantly lower than what will be normally imposed for a breach of section 423.1 of the *Criminal Code*" (para 4).

19 The Court in *Hefferan* also reviewed several Quebec decisions translated from French:

> a. *R. c. Bédard*, 2011 QCCS 518 (C.S. Que.) - the accused, who had a history of convictions for criminal harassment and contempt of court, and who was at the time undergoing trial for another charge of criminal harassment, threatened the Crown prosecutor in the hallway outside of the courtroom. He repeated the threats when subsequently in custody. Although the court rejected the Crown's application to have the accused declared a long-term or dangerous offender (affirmed 2014 QCCA 628 (C.A. Que.)), the Court sentenced him to five years in prison for the intimidation charge, together with three months concurrent for a breach of recognizance;
>
> b. *R. c. Charrette*, 2011 QCCS 5886 (C.S. Que.) - while imprisoned, the accused made threats against two corrections officers. He was sentenced to 18 months;
>
> c. *R. c. Anglehart*, 2012 QCCA 771 (C.A. Que.) - another case involving threats by an inmate against corrections staff. He had previously received a six-month sentence for a similar offence. The Quebec Court of Appeal overturned the trial judge's sentence of four years imprisonment, and substituted a sentence of 18 months, consecutive to time being served on other matters;
>
> d. *R. c. Veillette*, 2012 QCCS 4720 (C.S. Que.) - the accused gave "menacing looks" to a police officer scheduled to testify at a preliminary inquiry, then followed the officer in his vehicle and confronted him in person. The accused had no criminal record, and cared for his schizophrenic wife, his adolescent daughter and his two handicapped brothers. He had spent seven days in pretrial custody. The Court held that the principles of denunciation and deterrence did not require further custody, despite a danger of recidivism, and imposed a period of three years' probation, including 120 hours of community service.

20 In *R. v. Horton*, 2014 ONCA 616 (Ont. C.A.), the accused was convicted of intimidating a justice system participant and assaulting a peace officer. Both charges arose out of an incident where the accused kicked an occupied police cruiser, with the intention of intimidating or causing fear in the officer, who was at the time performing police duties. The Ontario Court of Appeal upheld a sentence of 10 months' imprisonment and two years' probation for the s. 423.1 charge, and imposed a concurrent six months' incarceration for the assault.

> 21 In *R. v. Redgun*, 2016 ABPC 236 (Alta. Prov. Ct.) [*Redgun*], the accused encountered a person who had alleged that the accused's daughter had been involved in certain criminal acts. The offender accused that person of lying, threatened to assault her, and followed her for a short distance. The accused was 48, had no previous record, and was a First Nations woman who had been abused as a child and who had attended residential school, as had both of her parents and all four of her grandparents. The Court stated that the primary sentencing considerations were denunciation and deterrence (paras 33 and 35), quoted *Michel* on the importance of protection of witnesses, and stated (para 43) that a violation of s. 423.1 will usually result in incarceration. In this case, the accused's *Gladue* factors affected her moral blameworthiness, the offence did not reflect her true character, and the Court held that the principles of denunciation and deterrence were met by the fact that the accused would now have a criminal record. She was given a suspended sentence and two years' probation.
>
> 22 There are several common themes which run through these cases:
>
> a. the primary sentencing considerations must be denunciation and deterrence;
>
> b. a conviction under s. 423.1 will normally result in a term of imprisonment;
>
> c. the range of sentences for a first offence is from a suspended sentence to 18 months in jail. The middle of the range seems to be 12 months' imprisonment;
>
> d. probation is frequently added to the jail term;
>
> e. in the case of a second offence, there is a significant increase in penalty.

[55] I consider the sentencing jurisprudence in relation to offences against correctional officers to be of the greatest assistance. That context is most similar to Mr. Lilly's case and involves similar circumstances. Correctional officers work with inmates day in and day out, and often cannot avoid contact with the offending inmates(s) or their surrogates. Moreover, Correctional Officer Hicks was both a **witness** to (December 2, 2019 and March 31, 2021) and **victim** of a crime (March 31, 2021).

[56] The institutional disciplinary process can usually effectively deal with the more impulsive, situational threats and behaviour that arise. If the matter is of sufficient concern that criminal charges are laid, I agree with the Québec Court of Appeal in *Anglehart*, *infra*, that upon conviction such matters require strongly deterrent and denunciatory sentences.

[57] Although each sentence must be individualized, inmates must understand that they will receive particularly significant sentences for such offences, in recognition of the important public interests threatened.

[58] The fact that Mr. Lilly spoke as if on behalf of, or for the benefit of, "the Crew"/"the Burnside 15", is an aggravating factor, as it naturally would increase a Correctional Officer's anxiety and fear regarding the likelihood of violence to their person or property.

[59] As the Quebec Court of Appeal puts it in *R. v. Anglehart*, 2012 QCCA 771, albeit it reduced a 48 month sentence to an 18 month one, to be consecutively served:

> 9 **As another aggravating factor, the judge held that the crime was perpetrated inside a prison establishment and expressed his agreement with the opinion expressed by the Superior Court in *R. c. Charette* [2] according to which any sentence imposed for a crime committed *intramurally* must be served consecutively to any other sentence served by the offender** [3] .
>
> …

> 16 There is no doubt that intimidation of a person associated with the justice system is a serious crime. **The proper functioning of the latter cannot tolerate the slightest attack on its authority.** It is therefore normal for the legislator to severely sanction any gesture or action intended to harm the administration of justice.
>
> …
>
> 28 **A review of the case law therefore reveals that the crime of intimidating a person associated with the justice system does not necessarily result in a prison sentence and that when it does, it generally does not exceed 36 months.**

[60] Having said this, I keep in mind Judge Schmalz's comments in *R. v. Michel*:

> 16 *'Justice system participant' is broadly defined in the Criminal Code to include many groups, witnesses and prospective witnesses being one of those groups. Many of the groups of participants that this section applies to, e.g. prosecutors, lawyers, officers of the court, even judges, play a role in the justice system, but their role is not confined to a specific case.* If the intimidation of a member of one of those groups is successful, there is likely another member of the group that can step in and the process will continue - there will always be another prosecutor, another lawyer, another judge, another court officer. Intimidation of any of them while still a very serious crime will not necessarily frustrate a prosecution.
>
> 17 *But if an accused successfully intimidates a witness, the result can be that the prosecution of that accused will be frustrated. Intimidation of a witness can result in significant damage to the administration of justice.* When a matter is set for trial and a witness does not attend, or does attend but refuses to testify, or recants on a previous statement, and the prosecution is terminated, the community may well lose respect for and confidence in the criminal justice system. If the process is frustrated, a criminal charge will not be resolved on its merits. *When an accused attempts to influence a witness to achieve such a result, there has to be meaningful consequences that will deter both the accused and others from such tactics and will express the court's and the community's condemnation of this conduct.*

[61] With this jurisprudential landscape in mind, and applying the common law and statutory principles of sentencing to the circumstances of this offences, and offender, what then is a fit sentence?

[62] Mr. Lilly's conduct was particularly culpable.

[63] He had an established history of violence and acted in concert with 14 other offenders on December 2, 2019 in a manner that seriously challenged the correctional facility's ability to control and manage the Burnside Jail.

[64] While he is not being sentenced by me for that offence, it is the context that leads to and explains the commission of the offence for which I will sentence him.

[65] Although, he only spoke words towards Correctional Officer Hicks, I am well satisfied he intended everyone present to hear them in person, and that he did so expecting that they would be communicated among the inmates and corrections staff throughout the Burnside Jail.

[66] Correctional Officer Hicks was just doing his rounds – he in no way did anything that could be seen to require a response from Mr. Lilly.

[67] The threats that Mr. Lilly made and the expectation that "the crew" did not want him to testify at all, or testify favourably at the May 2021 scheduled trial regarding the December 2, 2019, incident, the implication that they were in charge of the Burnside Jail, and he was at risk whenever he was at work there, is a significant threat, which strikes at the foundation of safety/security of a correctional facility and it would cause significant anxiety and fear for Correctional Officer Hicks, and others at the institution.

[68] Such challenge to the authority of correctional services in a jail, must be met with a strongly deterrent sentence, albeit still proportionate to the culpability of the offender and the gravity of the offences, his potential for rehabilitation, as well as bearing in mind the other principles of sentencing.

[69] Our Court of Appeal has indicated that the range of sentence for attempted obstruction of justice (which is a maximum of 10 years imprisonment) ranges from one day on the low end to three years on the high end.

[70] I am satisfied in the circumstances that a fit sentence in this case is 25 months imprisonment to be served consecutively to any sentence presently being served.

[71] I also impose orders under section 109(3) *CC* prohibition for his lifetime (firearms/explosives etc.); and (DNA) s. 487.051(1) CC.

Rosinski, J.