SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Burns*, 2023 NSSC 424

Date: 20231214
Docket: CRP-519247
CRP-519248
Registry: Pictou

Between:

His Majesty the King

v.

Justin Anthony Burns

SENTENCING DECISION GRANTING A CONDITIONAL DISCHARGE

Judge:	The Honourable Justice Joshua Arnold
Heard:	December 14, 2023, in Pictou, Nova Scotia
Oral Decision:	December 14, 2023
Written Decision:	January 16, 2024
Counsel:	Bill Gorman, for the Crown Robert Jeffcock, for Justin Burns

Overview

[1] One month after Justin Burns turned 18, he found himself homeless, hanging out with some other boys who were similarly in precarious situations, and unable to afford his ADHD medication. Prior to that time, Mr. Burns had no involvement with the criminal justice system. Then, over a span of three days, he committed a number of lower-end indictable offences that expose him to potentially significant penalties. The Crown says he should receive a 12-to-14 month conditional sentence, followed by 12 months' probation. The defence seeks a conditional discharge, or, in the alternative, a suspended sentence. I provided the parties with a "bottom-line" decision at the end of oral submissions on December 14, 2023, granting Mr. Burns a conditional discharge, including 18 months' probation. These are my written reasons.

Facts

[2] Mr. Burns pleaded guilty to the following offences:

> a. That on or about the 8th of June 2022 at or near Westville, Nova Scotia, did break and enter a certain place to wit a NSLC store situate in Westville, Nova Scotia and did commit therein the indictable offence of theft contrary to section 348(1) (b) of the Criminal Code
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> b. That between June 5, 2022 and June 8, 2022 at or near Pictou County, Nova Scotia, did steal a motor vehicle, Honda CRV, license GSU 540, the property of James Snyder and did thereby commit theft contrary to section 333.1 of the Criminal Code
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> c. That between June 5, 2022 and June 8, 2022 at or near Pictou County, Nova Scotia, did steal a motor vehicle, Kia Rio, license GUV 403, the property of Sabrina Snyder, and did thereby commit theft contrary to section 333.1 of the Criminal Code
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> d. That between June 5, 2022 and June 8, 2022 at or near New Glasgow, Nova Scotia, did commit mischief by willfully damaging without legal justification or excuse and without color of right property, to wit: green compost bins, the value of which did not exceed $5,000 contrary to section 430(4) of the Criminal Code.

[3] The facts were summarized by the Crown. In short, between June 5-8, 2022, Mr. Burns was a passenger in a stolen truck driven by C.S., which struck and damaged "numerous green compost bins". Subsequently it was determined that Mr. Burns, in concert with several co-accused (C.S., M.G., and T.M.) stole two

motor vehicles, and broke and entered at a Nova Scotia Liquor Commission store, breaking the front window with rocks and stealing a quantity of Blue Lobster vodka. After being arrested on June 8, 2022, Mr. Burns made a full confession.

[4] Mr. Burns's three co-accused were youthful offenders and according to the Crown received the following dispositions under the *Youth Criminal Justice Act*:

> 56. In relation to the events that are before the court, the three others, who were youth at the time, received the following sentences:
>
> a. Mr. M.: pled guilty to theft of motor vehicle contrary to section 333.1 x 3; trespassing at night contrary to section 177; mischief contrary to section 430 x 3; break and enter contrary to section 3481(1)(b) as well as several other offences arising from separate dates. He received an 18-month probation order.
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> b. Mr. S.: pled guilty to break and enter contrary to section 348(1)(b); theft of motor vehicle contrary to section 333.1 x2; trespassing at night contrary to section 177; mischief contrary to section 430(4); possession of stolen property contrary to section 354(1); and dangerous operation contrary to section 320.13. He received a 15-months probation order.
>
> c. Mr. G. pled guilty to break and enter contrary to section 348(1) (b); theft of a motor vehicle contrary to section 333.1 x3; trespassing at night contrary to section 177 and mischief contrary to section 430(4). He was not a first-time offender and received a sentence that involved deferred custody of 60 days followed by 18 months probation.

Presentence Report

[5] A presentence report was prepared in relation to Mr. Burns. With respect to Mr. Burns's family background, the report indicates that he is the younger of two children. His biological mother lives in Pictou County. He has had "minimal to no contact" with his biological father. He was placed in foster care as a child and adopted by Wayne and Flora Burns at the age of five. He said, however, that he was treated differently from their biological children, and after some conflict and rebelliousness, they "kicked" him out, after which he fell in with a "negative peer group," and began using drugs and doing "stupid things." His arrest was a "wake-up call", however, and he "got clean" with the help of his biological mother, with

whom he was now living. As for his situation at the time he was sentenced, the report stated:

> Currently, the subject is living with his biological mother while on a release order and noted he is single. He reports he is working and maintains a close relationship with his mother Angela, as well as his brother Dakota, who also resides with them. Mr. Burns notes he has no contact with either his biological father nor his adoptive parents. He advises he is also close with his maternal half-sister Marissa and her two half-siblings, Tyrone and Chevelle, whom he considers his siblings as well, and notes they are all close. The subject indicates he has no contact with his adoptive siblings.

[6] The report also refers to the views of Mr. Burns's biological mother, Angela Heath:

> Angela Heath, mother of the subject, recalls her son was a busy, active and outgoing little boy. She notes he was with her until he was approximately four years of age, when he was taken by Child Welfare and placed in foster care. Same advises he was adopted at the age of five and it was supposed to be part of the agreement that she still have visitation with him; however, the adoptive parents, in particular the adoptive mother, did not like this arrangement and made things "difficult". Ms. Health advises, she and her son were not allowed to hug or touch during their meetings, nor did they seem to want them to bond. She indicates they were very controlling, as well as strict with him, in his adoptive home. She added, once they "kicked him out" at the age of seventeen and cut off all communication with them, he got a taste of freedom for the first time and really made up for lost time. Ms. Heath indicates, initially when he was kicked out, he stayed with friends but, once he found her, he moved in with her. She admits he was using substances and associating with a negative peer group but feels, once he got into trouble, it opened his eyes and he "smartened up". Same indicates he is working now and trying to get into the Adult Learning Program for January but has not yet been accepted. She indicates he smokes marijuana but is not using any other drugs, nor drinking and feels, as he is "cooped up " due to conditions on his order, he continues to smoke "weed" as a result. Ms. Heath advises the subject may benefit from attending for counselling, to help him deal with the trauma of being taken by Child Welfare and adopted into a family where he did not have an easy time of it. She notes he has supports with her, as well as his siblings, and notes they are all close.

[7] The pre-sentence report goes on to address Mr. Burns's education, training, and employment history. He completed Grade 11 but quit school in Grade 12, and now intends to enter the Adult Learning Program at the Nova Scotia Community College, then take an Electrical Mechanical Technician training course. He has

been employed as a produce worker at Sobeys since the spring of 2023, having previously worked at McDonalds. (The author noted that Mr. Burns's Sobeys employment could not be confirmed, there having been no contact with his supervisor.)

[8] The report goes on to address issues of health, lifestyle, and the offender's prospects in the community. Mr. Burns indicated he was in good physical health. He reported a period of depression when he was 17, and said he went to four counselling sessions. He said he drinks rarely, but smokes marijuana three or four times a day. When he was 17, he said, he had experimented with other drugs, but now only uses marijuana. The author went on:

> **OFFENDER PROFILE**
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> Justin Burns was interviewed at the office of New Glasgow Correctional Services. At the time of the interview, he was polite, cooperative, and appeared to answer the questions in a truthful manner. He indicates he takes full responsibility for the offences but also admits he was "so high I did not know what I was doing". The subject further states, this is not in any way to excuse the behaviour, as he is responsible for his actions and feels remorse for the damage he caused, and for the individuals it impacted. He notes he would like to make reparations to the victims.
>
> …
>
> **ASSESSMENT OF COMMUNITY ALTERNATIVES/RESOURCES**
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> Justin Anthony Burns is appearing before the court as a nineteen-year-old first-time offender for charges of theft of motor vehicle (two counts), break and enter, and mischief. He is gainfully employed and appears to have some supports with his biological mother and siblings. The subject indicates he believes he had a problem with substances but not any longer, as he has given up all drugs except marijuana, which he feels is substituting for any prescription medications he might otherwise have to take but without any of the side effects.
>
> Collateral sources indicate he would benefit from mental health counselling.

[9] The presentence report references Mr. Burns having been diagnosed with ADHD as a child, having been on prescription ADHD medication when he was younger, but not being on that medication anymore and currently self-medicating with cannabis. In advance of the sentencing hearing, I advised the parties that I wanted further information and submissions on that issue. During the hearing I was advised that Mr. Burns was on prescription ADHD medication between the ages of five and seventeen (when he was asked to leave his home); by age 17 he

was on a very high dosage of Concerta with an additional booster of Intuniv to be taken in the evenings; when he was asked to leave his adoptive parents' home he no longer had access to their medical plan; he had no family doctor (and still does not have one); his ADHD medications cost approximately $800 per month without a medical plan; and he could not (and still cannot) afford the medication.

Sentencing under the *Criminal Code*

[10] Sections 718, 718.1 and 718.2 of the *Criminal Code* set out the 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.
>
> …
>
> **Fundamental principle**
>
> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> **Other sentencing principles**
>
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> > **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender,…

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

Crown Position

[11] The Crown says that custody is required and a discharge is inappropriate, seeks a conditional sentence of 12-to-14 months followed by probation, and focuses on the break and enter charge as the most serious:

> 10. The seminal and most recent Decision with respect to break and enters in Nova Scotia and a sentencing range for break and enters is the Decision of the Nova Scotia Court of Appeal in *R. v. Adams*, 2010 NSCA 42... The Nova Scotia Court of Appeal indicated that the starting point for a break and enter is a period of custody of 3 years with a sliding scale moving downward to 2 years in appropriate circumstances. *R. v. Adams* also stands for the proposition of how to determine a fit sentence and the determination of the appropriate approach to determine a fit and proper sentence.
>
> [As appears in original.]

[12] As for the analysis governing conditional sentence orders, the Crown says:

> 26. When conducting the analysis that is mandated by the Supreme Court of Canada in its seminal Decision of *R. v. Proulx*, initially a determination is to be made as to whether or not the fit and proportionate sentence is in excess of two years. The sentence recommendation the Crown makes in this case is well below the two-year threshold, so therefore I submit that a determination of the suitability of a conditional sentence order is appropriate.
>
> 27. When considering the purposes and principles of sentencing, when considering that a conditional sentence order is available, and when considering whether or not a period of custody is required, I respectfully

> submit that a period of custody is indeed mandated. A conditional sentence order of 12 to 14 months does indeed reflect denunciation and deterrence and when considering how the co-accused were dealt with in Youth Court under the Youth Criminal Justice Act, it achieves the objectives of parity while at the same time advancing the principle of proportionality. Suspending the passage of sentence in my respectful submission, does not communicate with sufficient clarity, denunciation and deterrence.
>
> 28. A global sentence of 12 to 14 months on a conditional sentence order with suitable conditions is reflective of restraint, consistent with the direction of the Nova Scotia Court of Appeal in *R. v. Adams*, and notwithstanding that a conditional sentence order is indeed a sentence of custody, it at the same time embraces the accused's lack of prior criminal record and the prospects of rehabilitation.
>
> [as in original]

[13] In *R. v. Zong*, (1986), 72 N.S.R. (2d) 432 (SCAD) and *R. v. McAllister*, 2008 NSCA 103, the NSCA confirmed that three years in jail is the starting point for a conviction for a commercial break and enter. However, in *McAllister*, Oland J.A., for the court, reiterated that the three-year benchmark can go up or down depending on the circumstances of the offender and the offence (*McAllister,* para. 40).

[14] The Crown relies heavily on *R. v. Adams*, 2010 NSCA 42, where the offender pleaded guilty to theft, break and enter and theft, possession of stolen goods, and counselling perjury. There were multiple counts of many of the charges, described as follows:

> **Break and Enter at Metro Self Storage**
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> [3] Between March 25 and 27, 2006 the respondent broke into several storage units at Metro Self Storage on Chain Lake Drive in Halifax. He carried out the offences by breaking through the gyproc walls connected to the adjacent storage units so as to avoid tripping the alarm which would have been triggered by entry through the storage unit door.
>
> [4] Property valued at $190,332.86 was stolen by Mr. Adams during these break-ins. It was electronic equipment owned by Wacky Wheatley's, much of which was slated to go to one of the IWK Dream Homes.
>
> [5] Of the total value stolen, $141,999 in goods was recovered at two locations. One portion was found by the police in a cube van located at 31

Cole Drive, which is the residence Mr. Adams shares with his common-law spouse, Ms. Susan Holman. The other portion of the electronic equipment was recovered by the police from a cube van located at another search site. It was not disputed that all of the equipment was in Mr. Adams' possession.

Break and Enter at United Rental Premises

[6] On December 18, 2005 Mr. Adams broke into United Rentals, a Dartmouth commercial equipment and supply rental firm. The fence surrounding the business's storage compound was cut open and a $2,000 plate tamper (a piece of construction equipment weighing about 300 pounds) and three pails of kerosene were taken, for a total value of $2,450.

[7] The plate tamper was recovered on April 19, 2006 when the police executed a search of Mr. Adams' residence.

Theft From LaFarge Construction

[8] On August 19, 2005, Mr. Adams stole another plate tamper, owned by LaFarge Construction, from a construction site on the Purcell's Cove Road. It was recovered on April 19, 2006, when the police conducted a search of the house located at 42A and B Frederick Avenue in Halifax, located in an area of the house controlled by Mr. Adams. Along with the plate tamper were found many additional items which were the subject of a possession of a stolen property charge, described below.

Counselling Perjury

[9] This offence was committed between August 30, 2007 and September 19, 2007. During that time frame, Mr. Adams was released on a $100,000 recognizance awaiting trial on the many offences for which he had been charged in June 2007. Included in the charges were those involving the theft of two utility trailers from a retail outlet as well as a charge of possession of one of the trailers, as only one had been recovered to that point. The missing trailer was subsequently discovered at a work site in Truro and tracked to Mr. Adams who, on September 5, 2007, was arrested and charged with its possession as well. He was taken to Provincial Court, the Crown intending to apply to revoke his recognizance. The revocation hearing was adjourned first to September 10, 2007 and then to September 19th. Between August 30, 2007 and September 19, 2007, continuing both before and after Mr. Adams was again committed to custody, he communicated with Charles Pare asking Mr. Pare to fabricate a story that this trailer was his and that Mr. Adams had unwittingly borrowed it from him without knowing it was stolen.

[10] At the sentencing hearing the Crown Attorney continued with the details of the offence, as outlined in his sentencing brief:

> . . . These communications while [Mr. Adams] was in custody occurred with the assistance of third parties who would facilitate three-way telephone calls eventually connecting [Mr. Adams] and Mr. Pare. [Mr. Adams] initial communications with Mr. Pare were for the purpose of Mr. Pare 'taking the charge' with respect to this trailer by way of providing this concocted story to Cst. Morgan. However, after [Mr. Adams] was taken into custody and the hearings were scheduled ...
>
> The hearings being, Your Honour, the bail revocation and the bail hearings.
>
> ... [Mr. Adams] counselling of Mr. Pare focussed on Mr. Pare providing perjured testimony at these hearings for which he offered to pay Mr. Pare $3000 to $4000, $4000 if Mr. Pare was able to have the trailer eventually returned to [Mr. Adams]. The ruse further involved Mr. Pare telling the Court that he bought the trailer from a man on the Ross Road in the Cole Harbour area of HRM who was heading to Western Canada. Mr. Pare was further counselled to say that he loaned the trailer to Trevor MacDonald and that Mr. Pare affixed the license plate registered to [Mr. Adams], which was found on the trailer when recovered by Cst. Morgan, without [Mr. Adams'] knowledge.
>
> So just to be clear, Your Honour, if there is any confusion, when the plate was recovered by the police in the Truro area that had ... when the trailer was recovered, it had a license plate that was registered to Mr. Adams on it.
>
> Unbeknownst to [Mr. Adams], Mr. Pare became a police agent with respect to this matter between September 5, 2007, and September 14, 2007. Mr. Pare gave his consent for a wiretap authorization of his telephone where approximately 17 pertinent calls were captured in addition to his previous phone calls and other conversations with [Mr. Adams]. [Mr. Adams] counselled Mr. Pare to attend court in Truro for [Mr. Adams'] show- cause and revocation hearings and provide perjured testimony that the trailer was his. On September 19, 2007, immediately prior to the scheduled hearings, [Mr. Adams] was arrested at Truro Provincial Court on this charge and the accompanying charges on this information.

Possession of Stolen Goods

> [11] Mr. Adams pleaded guilty to eight separate possession of stolen goods offences. Globally, these eight offences comprised 75 counts of possession of stolen goods rolled into eight counts. The first six counts, most of which were a consolidation of several counts, involved the possession of goods with the following, approximate pre-tax values: $24,500; $63,000; $22,700; $25,000; $4600 and $950. All items could be identified as deriving primarily from break and enters into commercial premises (including retail stores) or construction sites, some being from the same commercial establishment victimized multiple times.
>
> [12] In order to highlight the gravity of these possession offences I have provided, in Appendix A to these reasons, the details of the two largest composite counts. The value of the property possessed by Mr. Adams in those two counts was $97,499 and $101,458.01. As is evident from the particulars, the recovered goods could be tracked to sixty-four robberies perpetrated as far back as 2003 and continuing through to April of 2006. The value of the property stolen in those robberies substantially exceeded that which was found in Mr. Adams' possession.
>
> [Emphasis added]

[15] In *Adams*, the accused was the mastermind of a sophisticated and organized criminal enterprise and his crimes spanned a protracted period. This stands in stark contrast to the unsophisticated offences and impulsive crimes committed by Mr. Burns. Another distinction is the background of Mr. Adams, which was described as follows:

> [34] The extent of mitigation supported by the additional factors must be assessed in the context of the offences. That Mr. Adams had no prior criminal record is, with respect, more properly considered as the absence of an aggravating factor, given the length of time over which these offences were committed. These crimes were not representative of a momentary lapse in judgment or indicative of a short-term crime spree, where an offender might be granted some leniency. Mr. Adams' crimes speak of ongoing, long-term, organized, planned and targeted criminal activity which escaped police detection for a considerable period of time. In the circumstances, I would not consider the absence of a criminal record particularly mitigating.
>
> [35] As for the favourable pre-sentence report, at the time of sentencing Mr. Adams was 38 years old and had been a self-employed business man for 15 years. He employed 50 people in his several businesses. Those include a billiards parlour; a bar; a video game rental business, a snow clearing business and the construction and renovation of business properties. He co-owns

> several commercial and residential rental properties. Mr. Adams estimated his monthly take-home income at between $8,000 and $15,000. He resides with his common-law wife and her son in a mortgage-free home. He has no health or substance abuse issues. Remarkably, he maintained that, until he sat through the preliminary inquiry, he did not appreciate the impact his criminal activity has had on the owners of the stolen property. While the positive aspects of the pre-sentence report would be mitigating in the context of a single offence or brief spree indicative of a temporary lapse in judgment, the extent of mitigation relative to Mr. Adams' longstanding criminal activity is minimal.
>
> [36] It would be my view that Mr. Adams' moral culpability here is significant. As a mature businessman with an enviable income, there is simply no explanation for his crimes apart from the obvious profit motive. The duration of the criminal activity; the number of victims; the value of the property stolen and possessed; and the fact that the only reasonable inference here is that he acted as a fence for stolen property, thus facilitating the underlying thefts all contribute to the high level of moral blameworthiness.
>
> [Emphasis added]

[16] In contrast to the mature and organized offender in *Adams*, who had a high level of moral culpability, Mr. Burns was an immature young person, with an untreated mental health challenge. He was homeless and his life was in turmoil when his impulsive offences were committed, and therefore has a low level of moral blameworthiness.

[17] The court in *Adams* noted that the benchmark for break and enter is three years in custody:

> [39] Mr. Adams argues that the offenders in **Zong** and **McAllister** were much more seasoned criminals with extensive records thus more deserving of the three year sentences imposed. Mr. McAllister was a relatively youthful offender with a significant record as a young offender but there would be some hope of his reform with maturity. He and two others had broken into the Amherst Justice Centre and stolen some cheques. This Court found no reversible error in the sentence of three years imposed by the trial judge. On the other hand, Mr. Zong was a mature offender who had spent much of his life incarcerated. After a trouble-free three years in the community, he and a friend broke into a pharmacy while intoxicated. They were looking for narcotics. The trial judge had sentenced Mr. Zong to 18 months. This sentence was increased on appeal to three years. It is significant that in each of **Zong** and **McAllister**, the three year sentence was imposed for a single

> offence. In any event, the benchmark was not set for Mr. Zong or Mr. McAllister in particular, but is a statement by this Court, that the appropriate starting point sentence for this offence is three years. Clarke C.J.N.S. said, at p. 433:
>
> This Court has frequently observed that it looks seriously upon the invasion of property by break and enter and it has expressed the view that three years' imprisonment is a benchmark from which a trial judge should move as the circumstances in the judgment of the trial judge warrant.
>
> [Emphasis added]

Aggravating Factors

[18] The aggravating factors in this case include the following: the offences occurred over a three-day period; Mr. Burns was using drugs at the time; and the offences involving the motor vehicles were inherently dangerous;

Mitigating Factors

[19] According to the defence, the mitigating factors include the lack of planning and deliberation on Mr. Burns's part in committing the offences. These were crimes of impulse and opportunity, not premeditation:

> **Planning and Deliberation**
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> 13. It is submitted that the actions of Mr. Burns were impulsive and crimes of opportunity rather than ones of premeditation and sophisticated planning. On June 8th, Mr. Burns and his three friends (M. "M."G., C.S. and T.M.) were wondering [sic] around the community at night looking for unlocked vehicles with the goal of finding "loose change or liquor". While looking for unlocked vehicles the group came across two vehicles belonging to James and Sabrina Snyder. C.S. discovered that the vehicle was unlocked and found that the keys to the vehicle were located inside of it. The group of four enter the vehicle and take the vehicle for the purpose of joyriding around the county. Very shortly after setting off in the vehicle the group learned that a second set of keys were also inside of the vehicle. Thinking that this set may belong to the second vehicle parked at the residence the group returned. Once back at the residence, Mr. Burns and his friend M. exit the first vehicle and try the second set of keys on the second vehicle. The keys match and Mr. Burns backs the vehicle out of the driver way and drives for approximately 5-minutes before turning control over the vehicle over to his friend M. Mr. Burns remains a passenger in the second vehicle for the remainder of the night.

14. While in possession of the two vehicles, the boys then attend the NSLC located in Westville, Nova Scotia. The boys arrive and form a common intention to break the windows of the liquor store, enter the store, steal some alcohol and depart the scene in the two stolen vehicles. Mr. Burns in his statement, the only statement provided to police by any of the participants, describes his role in the incident as follows:

Mr. Burns: Well, all four of us threw a rock, but me and M. left and they're the ones that got the liquor.

Mr. Burns: So, we all threw a rock in, and then realized it was more than one sheet of glass.

…

Mr. Burns: And then me and M. got in the car and dipped. And it turns out, they actually got into it and got liquor, but we were already gone before. As soon as that rock hit, we left.

…

Mr. Burns: Um, the first one didn't hit, the second one did, and then I don't know what happened after that. They must have threw more rocks to get through it, because the second panel was there, and then me and M. dipped, 'cause we didn't think we would get through to it, like, the glass panel.

…

Mr. Burns: And then we left, they still weren't behind us, and then like, I don't know, like two ... not even a minute after that, they came down the road.

…

Mr. Burns: And they had stuff.

15. It has been acknowledged and Mr. Burns has admitted that he threw the rock with the intention of breaking and entering into the liquor store for the purpose of stealing alcohol. It was also admitted that despite him personally fleeing from the scene before any alcohol was taken, he did meet back up with Mr. S. and Mr. M. and share in the consumption of the stolen alcohol.

16. It is submitted that this series of events represents "spur-of-the-moment" offences, where Mr. Burns was part of a group of young people making poor decisions and taking advantage of an opportunity offered to him.

17. Likewise, the offence of mischief to which Mr. Burns has entered a plea of guilty was also a crime of opportunity and was an action consistent

> with his low level of maturity. On June 5, 2023, the same four boys were joyriding in another vehicle taken and driven by C.S. During this joyride, Mr. Burns was positioned in the back seat of the vehicle and in the course of driving around the county, Mr. S. repeatedly struck and damaged a series of compost bins that were positioned on the side of several different roads in the New Glasgow area. During the time of contact Mr. Burns was a passenger in the vehicle and was laughing and carrying on with the group. His involvement in the damage that occurred ought to be categorized as encouraging the unlawful behaviour and act which it is submitted is an indication of his immaturity.

[20] Defence counsel also points to Mr. Burns's youth and lack of maturity as a mitigating factor.

> 18. **Mr. Burns was born on May 11, 2004, when assessing the level of moral culpability, the Court must not lose sight of the fact that these incidents occurred less than one month after Mr. Burns turned 18 years of age. The charges before Your Lordship also represents the first time that Mr. Burns has ever been in trouble with the law, having no prior involvement with the justice system as an adult or a youth.**
>
> 19. **It is submitted that despite Mr. Burns' being 18, his level of maturity presents lower than others at his age**. This can be inferred from the fact that the three boys that he was associating with in June 2022 were significantly younger than he was. C.S. was born October 16, 2007, T.M. was born November 10, 2006, and M.G. was born October 16, 2007. **Despite being the oldest, Mr. Burns cannot be described as a "leader" during this spree of unlawful behaviour, but rather he was very much a "follower".**
>
> 20. **Prior to this incident, Mr. Burns was "kicked out" of his placement with his Foster Parents**. It is anticipated that this will be discussed in the pre-sentence report, but it is understood that this breakdown was due to an increasing level of tension between Mr. Burns and his Foster parents. **This left a period of time where Mr. Burns was without stable housing, which continued until Mr. Burns was reunited with his biological mother. During this period of instability, Mr. Burns drifted away from his previously prosocial ways and begun associating with the three boys who despite being younger in age had a negative influence on the older, but equally immature Mr. Burns**.
>
> 21. While nevertheless responsible for the ultimate outcomes, it is submitted that the fact that Mr. Burns was following along with the behaviour of the others should result in a lower degree of responsibility for the endeavour.

> 22. It is also submitted that these crimes were brought about by personal circumstances of a temporary nature which ought to be considered as mitigating. As mentioned above and anticipated to be discussed in the Pre-Sentence Report, Mr. Burns was in a state of instability, transitioning from a placement with his Foster Parents, to homelessness, to re-connecting with his biological mother. **Since being charged, and spending six days on remand, Mr. Burns was released on conditions requiring him to reside with his surety, and biological mother, Angela Heath. Since his release it has not been alleged that Mr. Burns has been in trouble with the law.** It is submitted that returning to the care of his mother has resulted in Mr. Burns returning to the path he was on prior to being associated with C.S., M.G. and T.M. His return to prosocial behaviour since these events suggests that this incident was a "bump in the road of life" rather than a "wrong turn" that has continued to be his chosen path.
>
> 23. **The root of the criminal activity in the case at bar can be eliminated and addressed through probation terms relating to things such as job training, counselling, and no contact with the individuals who produced a negative influence on Mr. Burns**.
>
> 24. It should be noted that Mr. Burns is not deflecting blame for his actions onto the others involved. Mr. Burns recognizes the wrongfulness of his actions and is remorseful for the harm that his actions has caused and for the inconvenience that he has caused to a large number of members in the community. His core prosocial attitude is likely what led to his providing an inculpatory statement to police while his companions remained silent.
>
> [Emphasis added]

[21] The defence also notes the offender's co-operation with the police and restrictive bail conditions in mitigation. He gave a full confession, pleaded guilty, and his information contributed to the arrests and guilty pleas of two others. His bail was strict, placing him on house arrest for about 18 months, after six days in custody. He has complied with all conditions.

[22] The defence emphasizes that the sentencing objectives as they relate to first-time offenders are primarily individual deterrence and rehabilitation:

> 32. As Justice Rosenberg of the Ontario Court of Appeal highlighted in *R. v. Priest*, [1996] O.J. No. 3369, the primary objectives in sentencing first offenders, are **individual** deterrence and rehabilitation:

> [17] **The primary objectives in sentencing a first offender are individual deterrence and rehabilitation**. Except for very serious offences and offences involving violence, this court has held that these objectives are not only paramount but best achieved by either a suspended sentence and probation or a very short term of imprisonment followed by a term of probation. In *R. v. Stein (1974), 15 C.C.C. (2d) 376* (Ont. C.A.) at page 377, Martin J.A. made it clear that in cases of a first offender, the court should explore all other dispositions before imposing a custodial sentence ....

33. Rosenberg, J.A. continued at paragraphs 22-24:

[22] The rule laid down by this court is that ordinarily for youthful offenders, as for first offenders, the objectives of individual deterrence and rehabilitation are paramount. See *R. v. Demeter and Whitmore (1976)32. C.C.C. (2d) 379* (Ont. C.A.). these objectives can be realized in the case of a youthful offender committing a nonviolent offence only if the trial judge gives proper consideration to alternatives to incarceration.

[23] Even if a custodial sentence was appropriate in this case, it is a well-established principle of sentencing laid down by this court that a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence. In *R. v. Vandale and Maciejewski* (1974), 21 C.C.C. (2d) 250 (Ont. C.A.) the Court had to consider the appropriate sentence for two youths who, like this appellant, were 19 years of age and had committed break and enter. Unlike this appellant, the accused in *Vandale and Maciejewski* had committed several offences which resulted in substantial property loss. There, as here, the trial judge stressed general deterrence. This court reduced the sentence of five and six months for the two accused to a sentence of 30 days jail and two years probation. Martin J.A. adopted the following statement of principle from *R. v. Curran* (1973), 57 Cr. App. R. 945 per MacKenna J. at pp. 97 4-8:

> As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long. disproportionate to the gravity of the offence, and imposed as this sentence was, for reasons of general deterrence, that is as a warning to others. The length of a first sentence is more reasonably determined by considerations of individual deterrence; and what sentence is needed to teach this particular offender a lesson which he has not learned from the lighter sentence which he has previously received.
>
> [Underlining added by Rosenberg J.A.]

> [24] Martin J.A. also stated that this emphasis on individual deterrence rather than general deterrence was particularly applicable in the case of a youth first offender. Those statements of principle were binding on the trial judge in this case and should have been applied. He should not have imposed a sentence, to paraphrase MacKenna J., that was very long, disproportionate to the gravity of the offence, and imposed as a warning to others.
>
> [Emphasis added.]

> 34. It is submitted that the impacts of the pre-sentence bail conditions cannot be understated. But for a total of 4 hours per week, Mr. Burns was confined to his mothers' apartment and his movement in the community limited to that which could only be done in the presence of his mother. As mentioned, these conditions were imposed 34 days after Mr. Burns' 18th birthday. He is now 20 years old, and for the entirety of his 'adult' life he has been confined to house arrest. His liberty during his formative years has been lost. His ability to socialize, date, travel, and participate in any public event has been lost. In the case at bar, specific deterrence and denunciation has been achieved.

[23] Finally, the defence notes that collateral penalties are relevant to determining whether specific deterrence has been achieved:

> 36. The *Motor Vehicle Act* requires an automatic revocation of a driver's license or driving privileges after a finding of guilt for the offence of theft of a motor vehicle contrary to section 333.1 of the *Criminal Code,* or when a motor vehicle was used in the commission of any offence. The Department of Motor Vehicle will suspend an individual's license for a period of two years for a first offence pursuant to section 333.1 and for a period of five years for a second offence. As such, Mr. Burns is aware that a collateral consequence of committing the above noted offences that he will be unable to be licensed in the province of Nova Scotia for a significant period of time. It is submitted that in a rural area such as Pictou County the inability to be licensed has a greater impact than it does on an individual in Halifax, as the rural communities in the provinces have little to no public transportation.

[24] I find that the mitigating factors in relation to Mr. Burns are the following: (1) He is a first-time offender who had not been involved with the criminal justice system prior to these offences; (2) he is a youthful offender who was an adult by only one month when he committed these offences; (3) his living conditions were unstable when these offences were committed; (4) there was no reported damage to the motor vehicles or the green bins; (5) he has ADHD - but was involuntarily not

on the medications he had taken for the previous 12 years when he committed these offences; (6) Mr. Burns fully cooperated with the police upon arrest and gave a statement admitting his involvement and the involvement of his cohorts; (7) as a result of telling on his cohorts, Mr. Burns was threatened and had to leave high school prior to completion; (8) he entered guilty pleas to the offences; (9) Mr. Burns was remanded for six days from the date of his arrest on June 8, 2022, prior to receiving bail on June 13, 2022; (10) Mr. Burns was on house arrest from June 13, 2022, so, as of the sentencing on December 14, 2023, he will have been on those conditions for 18 months or 550 days (between age 18 and 20). During that time, he was confined to his mother's small apartment and missed out on the significant developmental socialization that usually occurs for people of that age; (11) he has complied with the strict release conditions - which shows he has returned to his previous pro-social lifestyle; and (12) the *Motor Vehicle Act* requires an automatic revocation of Mr. Burns's driver's licence for a conviction under s. 333.1 of the *Criminal Code.* A first conviction results in a two-year suspension.

Conditional Discharges

[25] Section 730 of the *Criminal Code* governs conditional and absolute discharges. It provides, in part:

> **Conditional and absolute discharge**
>
> **730 (1)** Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).
>
> **Period for which appearance notice, etc., continues in force**
>
> **(2)** Subject to Part XVI, if an accused who has not been taken into custody or who has been released from custody under any provision of that Part pleads guilty to or is found guilty of an offence but is not convicted, the appearance notice, summons, undertaking or release order issued to, given or entered into by the accused continues in force, subject to its terms, until a disposition in respect of the accused is made under subsection (1) unless, at the time the accused pleads guilty

> or is found guilty, the court, judge or justice orders that the accused be taken into custody pending such a disposition.
>
> **Effect of discharge**
>
> **(3)** Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that
>
> > **(a)** the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;
> >
> > **(b)** the Attorney General and, in the case of summary conviction proceedings, the informant or the informant's agent may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and
> >
> > **(c)** the offender may plead *autrefois convict* in respect of any subsequent charge relating to the offence...

[26] Therefore, a conditional discharge is available as long as: 1) the offender is not an organization; 2) the offender is guilty of an offence for which there is no minimum sentence, nor carries a sentence of 14 years or more in prison; and 3) the discharge is in the best interest of the offender and is not contrary to the public interest.

[27] A conditional discharge is not to be granted sparingly, nor does it require exceptional circumstances (*R. v. Foley*, 2022 NSSC 47, at para. 28-29; *R. v. McQueen*, 2023 QCCQ 4646, [2023] Q.J. No. 6990, at para. 98; *R. v. Sanchez-Pino*, [1973] 2 O.R. 314 (Ont. C.A.)).

[28] In *R. v. Sellars*, 2013 NSCA 129, the appellant was denied a conditional discharge for fraud from her employer in the amount of $12,059.93, and instead received a suspended sentence with probation from the trial judge. Beveridge J.A. held that the trial judge erred in refusing a conditional discharge, and set out the background of the offence. The appellant had no prior record and had a history of mental health issues. She had become depressed after falling into cocaine use, and allowed her boyfriend to gain access to her health plan, under which he submitted false claims (paras. 5-10).

[29] Beveridge J.A. said, regarding the circumstances of the accused:

> [38] In this case, the Crown points to no factors that persuasively suggest a discharge would have a deleterious impact on the public interest. I recognize that the offence was hardly trivial, as the total loss admitted was in excess of twelve thousand dollars. On the other hand, the moral blameworthiness of the offender is ameliorated by the fact she was not the prime mover of this offence. Her fault was that she became aware of the misuse of her electronic password permitting her co-vivant access to a portal, and submit false claims. Her moral blameworthiness is also deflated by the fact that it was her mental illness that contributed to her involvement in the offence (See: *R. v. Edmunds*, 2012 NLCA 26 at para. 22)
>
> [39] It was apparent that people who knew her said she would be incapable, on her own, of committing such a dishonest scheme. The trial judge accepted that her crime was one of silence – that is, complicity by letting the scheme continue. What she did was out of character for her. It was the unchallenged opinion of a psychologist that it was the presence of major depression that served to maintain her inertia and not take steps to solve her personal issues with her common-law partner. This was not a made up condition. Her difficulties with depression were fully documented. Unfortunately, prior treatment had been unsuccessful.
>
> [40] Other relevant circumstances are that: the appellant pled guilty, and was very remorseful for her conduct; she did not benefit monetarily from the offence; she was a first time offender, who was bright and had considerably better prospects for her future if not convicted, and she was willing to make restitution.

[30] Beveridge J.A. explained the meaning of the term "not contrary to the public interest" in relation to a conditional discharge:

> [27] A discharge does not have to be in the public interest. It is available so long as the offence is not punishable by fourteen years, or life, it is in the best interests of the offender, and *not contrary to the public interest*. The difference between requiring a positive impact on public interest and demonstrating the sentence would not be contrary to the public interest is well expressed by LeBlanc J. in *R. v. D'Eon*, 2011 NSSC 330 where he wrote:
>
> > [25] If the Sentencing Judge did apply a test requiring that a conditional discharge be "in the public interest" rather than being "not contrary to the public interest," this would be the wrong test. There is a substantive difference between the two phrases; the correct "not contrary" test simply means that a conditional discharge would not be deleterious. It is not required to be have actual positive effect on the public interest.
>
> (See also *R. v. A.M.M.*, 2010 ABQB 514)

> [28] That is not to say that there may well be cases where an offender may actually be able to establish that a discharge is in the public interest. It would, then of course, be axiomatic that a discharge is not contrary to the public interest.
>
> [Emphasis in original.]

[31] In the instant case, defence counsel could point to no reported sentencing decisions from this province for break and enter that resulted in a conditional discharge. Following receipt of the parties' written submissions, and in advance of the sentencing hearing, the court referred the parties to several cases and asked for submissions on them.

[32] In *R. v. House*, 2012 NLCA 41, the appellant had received a prison sentence and probation for break and enter and assault, after going to the complainant's home on hearing that his girlfriend had gone home with the complainant. He entered the house and found the complainant's father, then encountered the complainant. Welsh J.A., for the court, summarized the event:

> [4] Mr. House asked Mr. Pieroway where his girlfriend was. When told she was in the bedroom, Mr. House went into that room and had a loud exchange of words with her. After leaving the bedroom, he saw Mr. Pieroway sitting on the couch in the living room. Mr. House challenged Mr. Pieroway to go outside, the implication being, to fight. Mr. Pieroway told him that he did not want to fight and that they should talk about it in the morning. Meantime, Mr. Pieroway's father demanded that Mr. House leave.
>
> [5] Mr. House testified that the three men were "all talking back and forth and gradually moving towards the entrance at the same time". When he got to the porch, he slipped his boots back on as they continued to argue. Mr. House testified that:
>
> > … Bruce was in the doorway, and we were exchanging words, same as before – and I actually grabbed him by the shirt and probably pulled on it a bit; and that's when he hit me in the face. And then, that's when I put my arm around him, I guess in – if you would call it a headlock – and we kinda' tumbled out onto the ground and I landed on bottom, and Bruce was on top. I couldn't really do much and he hit me three or four times; …
>
> The altercation ended quickly and Mr. House returned to work. Neither he nor Mr. Pieroway was injured. Mr. Pieroway's evidence regarding the incident is generally consistent with that of Mr. House. Two days later, Mr. Pieroway's father filed a complaint with the police and Mr. House was charged with break and enter and assault.

[33] After setting aside the conviction for break and enter and replacing it with a conviction for being unlawfully in a dwelling house, in considering the imposition of a conditional discharge, Welsh J.A. stated:

> [19] In this case, the preconditions for considering a conditional discharge are satisfied. Section 349, being unlawfully in a dwelling, provides for imprisonment for a term not exceeding ten years, and section 266, assault, provides for a term not exceeding five years. Neither prescribes a minimum punishment.
>
> [20] Whether a conditional discharge is appropriate in these circumstances requires a consideration of whether such a disposition would be in the best interests of the accused and not contrary to the public interest. These factors were discussed in *R. v. Elsharawy* (1997), 1997 CanLII 14708 (NL CA), 156 Nfld. & P.E.I.R. 297 (NLCA):
>
> > [3] For the court to exercise its discretion to grant a discharge under s. 730 of the **Criminal Code**, the court must consider that that type of disposition is: (i) in the best interests of the accused; and (ii) not contrary to the public interest. The first condition presupposes that the accused is a person of good character, usually without previous conviction or discharge, that he does not require personal deterrence or rehabilitation and that a criminal conviction may have significant adverse repercussions. The second condition involves a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes toward it and public confidence in the effective enforcement of the criminal law [authorities omitted].
>
> [21] The offences were committed by Mr. House in September 2008 when he was twenty years old. He has no criminal record. The pre-sentence report indicates that he completed high school in 2006 and a one year industrial mechanic millwright program at the College of the North Atlantic in 2007. He reported that he completed all his studies with honours. He has been employed more or less regularly since completing his course and was employed at the time of the hearing in this Court.
>
> …
>
> [24] As discussed in *Elsharawy*, in an assessment of whether a conditional discharge is in the best interests of Mr. House, the first condition presupposes that the accused is a person of good character, ordinarily with no previous criminal conviction or discharge. Based on the above, this supposition is satisfied in this case. As to the need for personal deterrence or rehabilitation, I note that Mr. House was on release, with conditions, on a Promise to Appear prior to his trial, and that he obtained judicial interim release, again with conditions, pending

> determination of his appeal. He has been compliant with the terms of release, particularly the requirement to keep the peace and be of good behaviour, for almost four years. Given the nature of the offence and Mr. House's conduct since the offences were committed, personal deterrence and rehabilitation are not matters of concern. Finally, regarding adverse repercussions from a criminal conviction, Mr. House is a promising young man who, in his twenties, is still maturing and developing the basis for a productive life including employment and relationship opportunities and decisions. A criminal record, where such is unnecessary for purposes of protection of the public, may result in roadblocks in terms of this development. Such a result is to be avoided provided Mr. House is otherwise a proper candidate for a conditional discharge.
>
> [25] The second condition that must be satisfied under section 730 of the *Criminal Code* is that a conditional discharge would not be contrary to the public interest. As discussed in *Elsharawy*, this involves a consideration of "the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes toward it and public confidence in the effective enforcement of the criminal law" (paragraph 20, above). A conditional discharge for the offence of being unlawfully in a dwelling-house in the particular circumstances of this case as discussed above would not engage a concern related to the principle of general deterrence such that Mr. House should be denied a such an order.
>
> [26] A similar analysis and conclusion applies with respect to the offence of assault contrary to section 266 of the *Criminal Code*. While the assault, which was minor in nature, constituted a separate offence, it was part of the same event and engages the same considerations. In the circumstances, it would be counter-productive and unreasonable to grant a conditional discharge in respect of the offence of being unlawfully in a dwelling-house while imposing a conviction and two month sentence for the assault. In the result, a conditional discharge is properly ordered with respect to the offence of assault contrary to section 266 of the *Criminal Code*. Since Mr. House was convicted of this offence, it is necessary, for purposes of ordering a conditional discharge, to set aside the conviction and substitute a finding of guilt. This is necessary because section 730 requires the court "instead of convicting the accused" to make an order for a conditional discharge (*R. v. Bartlett*, 2005 NLCA 75, 252 Nfld. & P.E.I.R. 154, at paragraph 3; *R. v. Prowse* (1998), 1998 CanLII 18024 (NL CA), 168 Nfld. & P.E.I.R. 289 (NLCA)).

[34] In *R. v. Lisi-Charlton*, 2013 QCCQ 5751, 2013 CarswellQue 6026, another case of an eighteen-year-old becoming involved with a break and enter, Healy, J.Q.C. described the facts:

> [1] On 27 February 2012 Ms. Lisi-Charlton foolishly joined her boyfriend and two others in a break-and-enter. She pleaded guilty to one count in July 2012. What is a just, fit and appropriate sentence? The prosecution seeks a suspended sentence with a term of probation. The defence proposes a conditional discharge. The point in common would be conditions but the consequences are, obviously, different.
>
> …
>
> [3] Ms. Lisi-Charlton had just passed her eighteenth birthday at the time of the offence. She has had no other confrontations with the law and she pleaded guilty without hesitation. She admits that her conduct was foolish and she has expressed remorse for it. She has said that she wishes earnestly to redeem her mistake and to embark upon a productive life in the community by academic studies and gainful employment. She says not only that she has learned a lesson but that she is committed to a good life within the law.

[35] In granting a conditional discharge, Healy J.Q.C. stated:

> [6] A conditional discharge can be a proportionate sentence within the meaning of section 718.1, and otherwise consistent with the objectives and principles of sentencing, only if it is in the interests of the offender and not inconsistent with the public interest. The Court of Appeal reviewed these notions in *Corbeil-Richard* and its restatement of the relevant criteria has been followed in many more recent cases. I intend to do the same.
>
> [7] I have already noted that Ms. Lisi-Charlton is young and that she is genuine in her remorse for the offence she committed and in her determination to redeem the mistake she made by study and gainful work. She has the opportunity and the will to become a productive member of society. Conversely, she must be forced to realise the seriousness of criminal conduct and society's intolerance of it. The offence she has admitted is particularly serious, even if there is no material damage, because it discloses a wilful disregard for the privacy and security of others - and their property.
>
> [8] A suspended sentence with probation does not preclude the objectives of rehabilitation and an increased sense of responsibility. My concern in this case, given all of the factual considerations I have stated, is that the duration of a criminal record until a pardon is secured would be disproportionate in the circumstances. For this reason I shall order a conditional discharge but in doing so I wish to make clear to Ms. Lisi-Charlton that she will have to comply fully with the conditions imposed. By doing so she will provide evidence that this court can have confidence in her determination to make amends for her mistake and to lead a productive life under the law.

[36] The sentencing judge in *Lisi-Charlton* cited *R. v. Corbeil-Richard*, 2009 QCCA 1201, the appellant pleaded guilty to sexual assault and breach of conditions. The sentencing judge imposed a conditional sentence of 11 months and 24 months' probation. The Court of Appeal substituted a conditional discharge for the community sentence. Morin J.C.A. said, for the court:

> [48] In this case, the appellant rightly maintains that the judge attached disproportionate importance to the objective seriousness of the offense, returning several times to the young age of the victim as an aggravating factor and neglecting to take into account takes into account, moreover, the various mitigating factors that he nevertheless identified.
>
> [49] In accordance with section 718.1 of the *Criminal Code* , the judge had to take into account not only the objective seriousness of the offense, but also its subjective seriousness.
>
> [50] However, as the judge himself noted, the appellant did not use violence or threats against the victim. He also did not commit a breach of trust towards her and the relations between these two people took place with the knowledge of their respective parents. In fact, even if this does not constitute a defense under section 150.1 of the *Criminal Code* , it appears from the evidence that the victim willingly consented to the actions taken by the appellant towards him. As for these actions, even if they are reprehensible, it should be noted that they were limited to touching over clothing and that they seem to have left no after-effects on the victim.
>
> [51] Furthermore, it should be noted that the appellant entered a guilty plea, which spared the victim the inconvenience of having to testify at a trial. He also has no criminal record.
>
> [52] It seems appropriate to quote here an extract from the report of psychologist Yves Michaud who carried out a psychological and psychosexual assessment of the appellant:
>
> > As for the encouraging factors, it must be said that he has real feelings of shame and regret at having developed such a close relationship and sexual behavior with the victim, and that he hopes that she will not develop any after-effects. Additionally, he is also willing to get involved in a therapeutic process to work on his personal psychological dynamics. Let us add that he seems to us to be an individual who remains normally capable of empathy and introspection, without an antisocial profile or drug addiction problem. He has no criminal history. In terms of the social sphere, he is valiant and he demonstrates enormous resourcefulness in finding work and keeping busy. Let us add that the loss of his job following the legal process, and the shame experienced in front of the community already seem to have had a deterrent impact on him.

> [53] Taking into account these various factors, I am of the opinion that the trial judge was wrong to close the door to the possibility of a conditional discharge, without further investigation.
>
> [54] Here is what the authors Béliveau and Vauclair state regarding the circumstances that could give rise to such absolution:
>
> > 2175. In principle, the interest of the accused presupposes that the latter is a person of good character, who generally does not have a criminal record and who does not present a problem in terms of specific deterrence and rehabilitation. Thus, the presence of another absolution in the file, even for an offense committed subsequently, must be taken into consideration from the angle of the character of the accused and will generally lead to the refusal of a second absolution. That being said, the Quebec Court of Appeal, in the *Chevalier* decision , clarified that the existence of a criminal record does not exclude recourse to absolution to the extent that the Code does not provide otherwise.
> >
> > 2176. As for the public interest, it is assessed, among other things, by the seriousness of the conduct and its impact in the community, by the need for general deterrence and, finally, by the importance of maintaining public confidence in the administration of justice. In this regard, the fact that the accused attempted to mislead the court during his testimony militates against the granting of absolution. The judge must also take into account the fact that it is not in the public interest for the accused to lose his job and be unable to provide for himself and his family.
> >
> > 2177. Generally, such an order is pronounced when the circumstances of the offense are not very serious while the consequences of a conviction could prove to be very serious; however, there is no reason to interpret the provision in a restrictive or exceptional manner, the only test being the balance between the interests of society and those of the accused. There is a particular imbalance between these interests when the law provides that in the event of a criminal conviction, an individual becomes disqualified from exercising a trade or profession. [13]
> >
> > [References omitted]
>
> [55] For my part, I consider that the appellant meets the conditions set out above and that the trial judge should have pronounced a conditional discharge on him rather than sentencing him to imprisonment in the community.

[37] In *R. v. Fehr*, 2019 MBPC 72, the two offenders, Mr. Fehr and Ms. Klimpke, had gotten drunk at a work Christmas party and were looking for a ride or a place to get out of the cold. They knocked on the complainant's door. During an exchange on the doorstep, and as the result of an apparent misunderstanding, the

offenders kicked the door in. There was an altercation in the house, and the offenders left. The two offenders were equally involved in the incident.

[38] In granting a discharge for both Mr. Fehr (conditional) and Ms. Klimpke (absolute), Rolston J. noted the remorse and insight demonstrated by Ms. Klimpke:

> [14] Ms. Klimpke does not remember what happened on the night in question. It is clear however, that she takes full responsibility for her actions and blames no one but herself. To say that her actions were out of character is an understatement. The Presentence Report, marked as exhibit s-1, details a background that reads more like the prologue to an award as opposed to the background details for sentencing. It is clear that Ms. Klimpke has dedicated her life to excellence in sport and is in the process of transitioning those skills acquired in these pursuits to setting up her work career. In doing so, it is evident that she has overcome some deficits and injuries and still has some potential to continue to play competitive hockey, possibly in the United States. The Court will not detail the many positive aspects of the presentence report since it is marked as an exhibit. It is clear that the report is evidence that this is an otherwise good person who did a very stupid thing.
>
> [15] There are several noteworthy details aside from her background that are mitigating. These details post date the incident before the court and demonstrate her character and remorse. Firstly, just four days after the incident and three days removed from a one night stay at the Winnipeg Remand Centre, Ms. Klimpke attended the Addiction's Foundation of Manitoba (see exhibit s-2, tab 2) for an assessment. This reveals that the incident was serious in Ms. Klimpke's mind and that she determined on her own that immediate remedial action was necessary. She has not consumed alcohol since that time. Exactly one month after the incident, Ms. Klimpke wrote a sincere letter of apology to the victims that demonstrates her remorse and insight into the extent of the impact upon them (see exhibit s-2 tab 3). It is also evident that Ms. Klimpke continues to struggle to rectify her actions in this incident as she continues to attend counselling over her involvement. These details are important when applying the principles of sentencing and will be discussed further shortly.

[39] In weighing the relevant sentencing considerations, the court said:

> [22] As has been stated, the Court must strive to achieve a proportional response to the wrong done that reflects what has happened and who the offender is.
>
> [23] To what degree does the goal of denunciation need to be met? At first blush, it is clear that society should be interested in denouncing the act of forcibly entering a home while intoxicated at night. No doubt, this was an ugly incident.

However, it must be remembered that this incident did not begin as a forcible entry. It commenced as a knock on the door and a plea for help. Both Mr. Fehr and Ms. Klimpke were cold and desperate for help, albeit both were clouded by alcohol. Their moral culpability was on the low end of the scale. The need for denunciation of acts where there is little moral culpability is logically lower than when the offender is highly culpable.

[24] To what degree is there a need for deterrence? The Court is satisfied that there is no further need for specific deterrence for either offender here. Both spent the night in custody. Both stopped drinking. As the Court alluded to at the outset, it is evident the events of December 2, 2018 had a profound impact on their lives. The Court is satisfied that similar events will not happen again for either offender. In terms of general deterrence, it is important to question what behaviour is sought to be deterred. While the Court acknowledges that drinking excessive amounts of alcohol leads to poor choice making, excessive drinking behaviour is not illegal. It is the forcible entry that the Court must be concerned about. The caselaw, or lack of it provided, by counsel illustrates that drunken forcible entries to homes is not a pressing problem and that the present offence is as it seems, a very unique and unfortunate set of circumstances driven by poor drunk decision making.

[25] To what degree is there a need for reparation? Given that victim impact is the most significant aggravating factor in this case, it logically follows that victim reparation should be at the forefront. The Court has already ordered the remainder of restitution be paid. The emotional toll of the events of December 2, 2018 are likely the hardest part to repair. The feedback received by the court as to the victim's reactions illustrates that they will not likely ever fully feel safe again. The Court has alluded to the fact that the Crown opened a pathway to a meaningful apology already. It is evident that this was effective as the victims were able to gain some solace from the words of the offenders and from knowing who they are as people. It is noteworthy that the Soulodres were more concerned about Mr. Fehr than Ms. Klimpke. It is also noteworthy that Mr. Fehr pledged to take programming in his apology.

[26] To what degree is separation from society required in this case? This goal of sentencing is often discussed in conjunction with the principle of restraint. The Crown's position already takes into account restraint to a degree, by limiting separation from society to house arrest. It is also noteworthy that both offenders were jailed for one night as well. With respect, the Court does not see why further jail is required here for the reasons discussed above. In other words, separation from society does not further or enhance the goals of sentencing in any way here. Jail should be a last resort reserved for only those cases where it is necessary to accomplish the goals and principles of sentencing where other sentencing options cannot. The Court is satisfied that this is not one of those cases.

…

> [30] Mr. Fehr, you have taken responsibility for your actions by pleading guilty. You spent a night in custody and have been subject to strict bail conditions for the better part of a year. Your actions have indicated an acknowledgment of the harm done by way of your apology and offer of restitution. Based upon your acknowledgement of your wrongdoing and taking into account your efforts since this incident, the Court is satisfied that it would not be contrary to the public interest to grant you a discharge.

[40] As to the specific details of the sentence for the two offenders, the court said:

> [31] The Court has determined that a 12 month conditional discharge is appropriate for you. This means that you will be placed on probation for 12 months. So long as you complete the terms of your probation, there will be no conviction entered in this matter. If you do not complete the terms of your probation, you may be brought back before me to determine whether a different order should be imposed.
>
> [32] I want to explain to you why I am putting you on probation. You will recall that Mr. Soulodre was particularly concerned about the anger exhibited in your language and your manner that night. Your Presentence Report reveals that you have struggled with some anxiety, and that you have not dealt with that in the most healthy way. Your supports may not have helped the situation, if they have enabled your behaviour. While you may not have substance abuse issues, you have consumed hard drugs in the past. It seems to the Court that some further exploration of these issues is necessary. Moreover, you, yourself pledged to your victims that you will seek counselling. In order to make your apology meaningful, the Court is of the view that some counselling is necessary. Additionally, the Court feels that it is necessary to impose some community service work so as to properly promote responsibility for your offending. Lastly, the Court feels compelled to accede to the wishes of the Soulodres and impose the no contact and non-attendance conditions requested. In the Court's view, with these conditions attached to a conditional discharge, the Court can address the harm done to the Soulodres.
>
> [33] Therefore, the conditions of your probation, by way of a conditional discharge for 12 months is as follows:
>
> You are to:
>
> - Keep the peace and be of good behaviour.
> - You must not contact or communicate directly or indirectly with Guy and Doris Soulodre.
> - You must not attend to any place where Guy and Doris Soulodre reside, work or worship.

- You must report to Probation Services within two days after today's date. After you first report, you must continue to report and be supervised by your Probation Officer when and how you are told to by your Probation Officer.
- You must attend, participate and complete counselling, assessments and programming as directed and supervised by your Probation Officer.
- You must complete 25 hours of community service work, as directed by your Probation Officer. The community service work must be completed within the first eight months of your Probation Order.

[34] Ms. Klimpke, the Court has outlined the efforts that you have made since you committed this offence. While it is necessary that the Court try to impose a similar sentence for you, as Mr. Fehr's, I must also consider that you have your own unique background. You do not present as a person who has struggles similar to Mr. Fehr that require counselling. If anything, you have become so focused in your pursuit of excellence on the ice that you have chosen not to let your background impact who you intend on becoming. While this is a strength in many ways, ignoring your background may impact you as your hockey career winds down and you must focus on other areas of your life. Part of the Court's role in sentencing is to consider the circumstances of your background as an Indigenous person. This is typically done with other offenders by exercising restraint and not imposing jail. At first blush, the qualities you have acquired as a hockey player make you very valuable for performing community service by serving as a positive role model for all children, but more specifically for young indigenous women. This is a demographic in need of role models. Ironically, because of the nature of a condition discharge, imposing community service work upon you would reduce your ability to reach your goals and fulfill your potential to be a role model. You have demonstrated a willingness to step forward as a coach and mentor through your volunteer work and through your recent involvement with the Neechiwaken program. To that end, in light of your background, and your efforts since these offences, the Court is satisfied that a discharge is not contrary to the public interest. The Soulodres did not seem to be as concerned about the Court imposing protective conditions against you. The Presentence Report suggests that no further counselling is needed in your case. The Court takes into account your background as an Indigenous person and in particular, finds that inhibiting travel to the United States will potentially curtail your career, which would impact your ability to serve as a positive role model. Therefore, in your case, the Court finds that an absolute discharge should be granted in this unusual circumstance.

[41] In *R. c. McQueen,* 2023 QCCQ 4646, a group of animal rights activists broke into a pigsty, filmed the conditions they found, and occupied it, refusing to leave for several hours, until they were arrested. In determining that a conditional

discharge was appropriate for some of the offenders, Labrie J.Q.C. made the following remarks about aggravating factors:

> 49 The Court considered the following aggravating factors:
>
> 1.The main offence of breaking and entering was premeditated and planned. The offenders met at a predetermined location at a specific date and time. They all travelled together to a farm location unknown to them, but they knew it would be a farm raising animals for meat production. On-site, before entering the piggery, the offenders donned protective clothing: coveralls, shoe covers, gloves and hair covers. They also put on identical T-shirts over the coveralls, bearing the same message: "Rose's law". They moved around inside the pigsty and made several video recordings, which they would later broadcast and make public. A second group of activists demonstrated outside the pig farm, holding placards.
>
> 2.The duration of the breaking and entering, the mischief, and the occupation of the pigsty by the activists for at least four (4) hours.
>
> 3.The break-in and occupation took place on private property.
>
> 4.The offenders refused to leave the piggery and the private property, despite repeated requests from one of the owners;
>
> 5.The offences committed by the offenders necessitated a major police operation, lasting several hours and involving the deployment of a large number of police officers.
>
> 6.The degree of responsibility and moral blameworthiness of the offenders. The Court refers to the reasons given in its decision convicting the offenders. Each of the offenders equally and actively participated in the commission of the offences, knowing that their actions were illegal. In Mrs. McQueen's case, the degree of responsibility is slightly higher, since she acted as the group's spokesperson, negotiating with the police officers, and formulating demands and requirements before the group would agree to leave the premises. However, the degree of moral blameworthiness of the offenders is lessened by the fact that they were motivated by their sincere conviction that this form of peaceful but illegal and intrusive protest was necessary to draw public attention to the conditions under which pigs are raised for food, to assert animal rights and promote legislative changes to review the treatment reserved for certain animals raised for food. In its decision, the Court rejected their defense, based on section 430(7) Cr.c., freedom of expression and the right to demonstrate. This in no way mitigates the seriousness of the offences committed, nor

> their consequences for the victims, since they deliberately chose to use illegal means, akin to civil disobedience, to defend a cause. On the other hand, this context is relevant in assessing their degree of responsibility and moral blameworthiness. The adoption of civil disobedience methods in the promotion of a just cause does not transform illegal actions into legal ones. But the motives and idealism of those who commit an act of civil disobedience, are to be weighed in the balance. Moreover, the Court is taking into account that the offences committed did not involve any form of violence other than the intrinsic form of violence associated with the breaking and entering into a private building and its occupation during a certain period of time. The Court is also taking into account, for the reasons given in its previous decision, that the offenders did not cause any damage.
>
> 7.The significant impact of the offences committed for the victims. Firstly, on the day of the events, the members of the Grégoire family experienced immense stress. In the case of Ms. Josiane Grégoire, she was traumatized, as was her 7-year-old daughter. Secondly, following the events, Ms. Josiane Grégoire, Mr. Maxime Grégoire and Mr. Daniel Grégoire suffered from stress and insomnia. They feared that other protesters would break into their farm, day, or night. Mr. Maxime Grégoire would sometimes get up in the middle of the night to go into the pigsty to check if someone was inside. In Ms. Grégoire's case, her fear, stress, and anxiety continued to amplify in the following weeks, and she had to seek professional help for her children and herself to manage such stress and anxiety. Her children expressed fears that people they didn't know would come into their home and harm them or the animals. Thirdly, following the publication on social media of images taken inside and outside the pigsty by the offenders, Ms. Grégoire and Mr. Maxime Grégoire were harassed by unknown persons. They received numerous phone calls and messages, including insults and hate messages. However, there is no evidence suggesting the offenders made these calls or sent those messages. Fourthly, the Grégoire family was devastated by the events and their consequences. Mr. Maxime Grégoire suffered, and was still suffering at the time of the sentencing hearing, from severe depression and headaches. Mr. Daniel Grégoire suffered from headaches and stomach aches and experienced problems with his too-high blood pressure. Finally, since the events, several incidents occurred at the farm, leaving the Grégoire family feeling harassed: a drone flew over the farm and took images that were then published on social media; two farm gates were kicked in; and people drove around and on the farm property. However, there is no evidence showing that the offenders would have committed any of these misdeeds.

[42] As to mitigating circumstances, Labrie J.Q.C. said:

50 A mitigating factor is only, by definition, a factor that is relevant in assessing the seriousness of an offence or the degree of responsibility of an offender in committing the offence.

51 The Court will identify the mitigating factors established during the testimonies of some offenders, by their written statements, or by the evidence filed during the hearing, including the information given by their lawyers related to their personal circumstances.

52 The Court identified the following mitigating factors, some of those only applying to some of the offenders:

> 1.The offenders have never been convicted of any criminal offence, other than those for which the Court is rendering sentence;
>
> 2.The offenders have good characters and good reputations. They are assets for their respective communities and society;
>
> 3.The young age of some of the offenders at the time of the offences: Ms. Primas (22), Ms. Wells (24), Ms. Phaneuf Croteau (25) and Ms. Trottier (29);
>
> 4.Some of the offenders acknowledged their responsibility for the acts committed. This is the case for Ms. Valerio, Ms. Trottier Harrison, Ms. Primas, Ms. Wells, Ms. Bartosek and Ms. Gibouleau;
>
> 5.Some offenders have introspected and questioned their actions. This is the case for Ms. Valerio, Ms. Primas, Mr. Clapis and Ms. Gibouleau. Mrs. Gibouleau and Mr. Clapis even expressed regrets for having committed those offences;
>
> 6.Some offenders expressed sincere empathy for the victims, acknowledging the harm done to them. This is the case for Mrs. McQueen, Ms. Primas, Ms. Bartosek, Ms. Gibouleau, Ms. Trottier and Mr. Clapis;
>
> 7.The Court is convinced that there is no risk of re-offending for all offenders except for Mrs. McQueen and Ms. Trottier, for the reasons set out later in this decision.

53 In addition, certain circumstances, while not recognized as mitigating factors, may nevertheless be considered relevant circumstances related to the offenders' personal circumstances, having a favorable impact on sentencing.

…

98 A discharge can be granted even for a serious crime, as long as the statutory conditions are met. Otherwise, the courts would be creating exclusions where the

> legislator did not, thus creating a real danger that the sentence would become a response to the crime alone, rather than a just sentence proportionate to the crime and the offender.
>
> 99 The golden rule is that the sentence imposed must not be disproportionate to the offence committed.

Applying the s. 730 Factors to Justin Burns

1) *The offender is not an organization;*

[43] Justin Burns is not an organization.

2) *The offender is guilty of an offence for which there is no minimum sentence, nor carries a sentence of 14 years or more in prison.*

[44] None of the crimes to which Mr. Burns entered guilty pleas impose a mandatory minimum sentence, nor do they carry a sentence of 14 years or more in prison.

[45] Section 333.1(1) of the *Criminal Code* states:

> **333.1 (1)** Everyone who commits theft is, if the property stolen is a motor vehicle, guilty of an offence and liable
>
> > **(a)** on proceedings by way of indictment, to imprisonment for a term of not more than 10 years, and to a minimum punishment of imprisonment for a term of six months in the case of a third or subsequent offence under this subsection; or
> >
> > **(b)** on summary conviction, to imprisonment for a term of not more than two years less a day.

[46] Sections 348(1)(b) and (e) of the *Criminal Code* state:

> **348 (1)** Every one who
>
> > …
> >
> > **(b)** breaks and enters a place and commits an indictable offence therein,
> >
> > …
>
> is guilty
>
> > …

> **(e)** if the offence is committed in relation to a place other than a dwelling-house, of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.

[47] Section 430(1)(a) and (4)(a) state:

> **430 (1)** Every one commits mischief who wilfully
>
> **(a)** destroys or damages property;
>
> …
>
> **(4)** Every one who commits mischief in relation to property, other than property described in subsection (3),
>
> **(b)** is guilty of an offence punishable on summary conviction.

[48] Therefore, all of these offences allow for the imposition of a discharge.

3) The discharge is in the best interest of the offender and is not contrary to the public interest.

[49] Mr. Burns was just past his eighteenth birthday when the crimes were committed. He has no criminal record and has abided by strict release conditions since his arrest on these charges. He has his whole life ahead of him. Having a criminal record at the age of 18 will certainly be a detriment to his ability to move forward with his life. It is clearly in his best interest to receive a discharge.

[50] In *Sellars*, Beveridge J.A. explained the test an accused must meet when determining whether the granting of a discharge is "not contrary to the public interest":

> [27] A discharge does not have to be in the public interest. It is available so long as the offence is not punishable by fourteen years, or life, it is in the best interests of the offender, and *not contrary to the public interest*. The difference between requiring a positive impact on public interest and demonstrating the sentence would not be contrary to the public interest is well expressed by LeBlanc J. in *R. v. D'Eon*, 2011 NSSC 330 where he wrote:
>
> > [25] If the Sentencing Judge did apply a test requiring that a conditional discharge be "in the public interest" rather than being "not contrary to the public interest," this would be the wrong test. There is a substantive difference between the two phrases; the correct "not contrary" test simply means that a conditional discharge would not be deleterious. It is not required to be have actual positive effect on the public interest.

(See also *R. v. A.M.M.*, 2010 ABQB 514)

[28] That is not to say that there may well be cases where an offender may actually be able to establish that a discharge is in the public interest. It would, then of course, be axiomatic that a discharge is not contrary to the public interest.

…

[32] There is no dispute that the appellant is eligible to be considered for a discharge, nor that such a disposition would be in her best interests. The only hurdle left is the issue: would a discharge be contrary to the "public interest".

[33] "Public interest" is not statutorily defined. In my opinion, it is not possible, nor even desirable, to try to arrive at an all-encompassing definition of the myriad factors that may impact the inquiry. There are helpful guides to be found in the appellate decisions that followed the enactment of the discharge provisions.

[34] For example, in *R. v. Sanchez-Pino* (1973), 1973 CanLII 794 (ON CA), 11 C.C.C. (2d) 53, [1973] O.J. No. 1903 (Q.L.), Arnup J.A., for the Court, wrote:

> 18 Obviously the section is not confined to "simple cases of possession of marijuana". It is not confined to any class of offences except to the extent I have noted. On the other hand, it is only common sense that the more serious the offence, the less likely it will appear that an absolute discharge, or even a conditional one, is "not contrary to public interest". In some cases, the trivial nature of the offence will be an important consideration; in others, unusual circumstances peculiar to the offender in question may lead to an order that would not be made in the case of another offender.
>
> 19 To attempt more specific delineation would be unwise, and might serve to fetter what I conceive to be a wide, albeit judicial, discretion vested in the trial Court. That Court must consider all of the circumstances of the accused, and the nature and circumstances of the offence, against the background of proper law enforcement in the community, and the general criteria that I have mentioned.

[35] In *R. v. Fallofield* (1973), 1973 CanLII 1412 (BC CA), 13 C.C.C. (2d) 450, the British Columbia Court of Appeal canvassed a number of authorities and set out a list of conclusions drawn from them. With respect to "public interest", the Court wrote:

> (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.

> [36] More recently, in *R.v. Elsharawy* (1997), 1997 CanLII 14708 (NL CA), 119 C.C.C. (3d) 565, [1997] N.J. No. 249, Green J.A., for the Newfoundland Court of Appeal, commented:
>
> > [3] …The second condition involves a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effective enforcement of the criminal law. See R. v. Fallofield (1973), 1973 CanLII 1412 (BC CA), 13 C.C.C. (2d) 450 (B.C.C.A.) and R. v. Waters (1990), 1990 CanLII 7561 (SK KB), 54 C.C.C. (3d) 40 (Sask. Q.B).
>
> [37] In my opinion, what factors are in play, and the weight to be put on them, in determining if a discharge would be "not contrary" to the public interest, will vary depending on the circumstances of the offence and of the offender.

[51] In granting a conditional discharge in *Sellars*, Beveridge J.A. stated:

> [41] We live in a compassionate society; one that recognizes that for some offenders, the full weight of a criminal conviction is not necessary. I cannot help but think that a reasonable observer, with full knowledge of the documented psychiatric history of the appellant, the role that it played, and the other circumstances, would be moved to say a discharge is not contrary to the public interest.

[52] Although, as noted, the defence could not point to any break and enter cases in Nova Scotia for which an offender received a conditional discharge, they did provide decisions in which conditional discharges have been granted for serious offences: in *R. v. Foley* the accused had a prior discharge as well as multiple prior convictions, and pleaded guilty to two counts of a breach of undertaking and one count of causing a disturbance with racial undertones; in *R. v. Capstick*, 2006 NSSC 33, the offences were uttering threats and assaulting an eight-year-old with a weapon; in *R. v. Thompson*, 2017 NSPC 18, misleading the police by giving a false statement that protracted a homicide investigation; in *R. v. Daley*, 1997 CarswellNS 326, (1996), 162 N.S.R. (2d) 222, (NSSC), domestic assault; in *R. v. Hayes*, 2018 NSPC 74, defrauding Blue Cross of $35,178; in *R. v. Donovan*, 2013 NSPC 83, assault of a vulnerable person by person in position of trust; and in *R. v. Matheson*, 2007 NSPC 43, trafficking in cannabis.

[53] In *Daley*, Moir J. stated:

> **15** Section 736 of the *Criminal Code* holds out the possibility of a discharge so long as the accused is an individual, there is no minimum penalty and the

> maximum penalty is less than 14 years imprisonment. Those restrictions are broad enough to cover very serious offences including some which have special sociological implications. In providing for the prerequisite that the judge must be satisfied a discharge is not contrary to the public interest, Parliament did not delegate to the judges authority to carve out entire offences or categories of offence. In my opinion, each case must be assessed in the particular with much weight against a discharge where, as here, the public interest emphasizes general deterrence. I refer to the sixth principle set out in *Fallofield* at p. 455 of the C.C.C. text and to the first and second full paragraphs at p. 59 of the C.C.C. report of *Sanchez-Pino*.
>
> **16** To hold, as I take the Provincial Court Judge to have done, that a conditional discharge is always contrary to public interest in cases of spousal assault is, in my opinion, to decline a responsibility the elected branch of government has imposed upon the judiciary. For example: some people come to court with unfair disadvantage due to race and culture or from a materialistic environment where the frustrations of economic disadvantage lead to misconduct. The courts will look for opportunities to make the field more level. To preclude discharges for entire categories of offence is to disavow an instrument that could be used judiciously to address other important public interests. (Parenthetically, I am not suggesting that spousal assault is a particular problem of the poor or of any culture. In fact, we know that the problem is prevalent in all parts of society.)

[54] In *R. v. Auclair*, 2006 QCCQ 7093, Vauclair J.C.Q. stated that denunciation and deterrence can be achieved by the imposition of a conditional discharge:

> 24 The Court is not of opinion that general deterrence and denunciation can only be accomplished by the imposition of a criminal record. Processing the matter through the criminal justice system is in itself a strong signal that violence is not accepted. A well-informed observer knows that a discharge does not condone the offence but is a measured response to an offence, committed by a particular offender, in a particular set of circumstances.
>
> 25 It must not be forgotten that, similarly to the suspended sentence, a discharge may be revoked and a conviction entered if the offender is convicted of any new offence, including a breach of the probation order.

[55] The defence points out that for similar reasons, offenders in this province and in other provinces have received suspended sentences despite having committed very serious crimes, and provided a number of cases in support of this proposition (for example: *R. v. Palmer*, (1976), 17 N.S.R. (2d) 236 (S.C.A.D.); *R. v. Newell and Poteri* (1983), 60 N.S.R. (2d) 33 (S.C.A.D.); and *R. v. Barrons*, 2017 NSSC 216).

[56] While general and specific deterrence, along with denunciation, are of paramount importance in sentencing Mr. Burns, the principles of rehabilitation and reformation do have significance in relation to this youthful adult. It would not be contrary to the public interest to grant a conditional discharge on the specific facts of this case, when combined with Mr. Burns's personal characteristics and circumstances.

Totality

[57] In *Adams*, the court clarified that when an accused is being sentenced for multiple crimes, in considering totality the sentencing judge must turn their mind to what each individual sentence should be:

> [27] In **R. v. A.T.S.**, 2004 NLCA 1, Rowe, J.A., writing for the Court, discussed these different approaches. He concluded that, where a judge gives effect to totality by first fixing the global sentence and then assigning the individual sentences to fit within the whole, s/he is more likely to pass a sentence which is problematic. As he observes, this formulation leads to confusion about the appropriate sentence for the individual convictions, had they been committed alone. It creates further difficulties where some but not all of the convictions are successfully appealed. In that instance, there is no guidance for the appellate court as to the appropriate sentence for the remaining offences. I would agree.
>
> [28] Here, with respect, I would conclude that the judge did not turn his mind to the appropriate sentence for each individual conviction, but worked backwards from a global disposition. Although that methodology does not necessarily produce an unfit sentence, here it was an error in principle which, in fact, resulted in a sentence that is manifestly unfit (excessively lenient) for these crimes and this offender.
>
> …
>
> [30] To determine whether this seemingly low global sentence is, in fact, manifestly unfit I will consider what would be a fit sentence for the individual convictions, taking into account consecutivity and concurrency, and then take a last look to determine whether the resulting total sentence is excessive. Before doing so it is helpful to discuss the aggravating and mitigating factors.

[58] However, in *R. v. Hunt* (1982), 55 N.S.R. (2d) 68 (S.C.A.D.), MacDonald J.A., for the court, clarified, at paras. 6-9, that if an offender is being sentenced to probation, and not a term of imprisonment, one global probation order should be imposed:

> The probation order made under s. 663(1) of the Criminal Code is a sentence as defined in Code, s. 601.
>
> Section 649(1) of the Code provides that a sentence commences when it is imposed except where a relevant enactment otherwise provides. The only Code provision relating to the commencement date of a probation order is s. 664(1) which states:
>
> > 664(1) A probation order comes into force
> >
> > (a) on the date on which the order is made, or
> >
> > (b) where the accused is sentenced to imprisonment under paragraph 663(1)(b) otherwise than in default of payment of a fine, upon the expiration of that sentence.
>
> The recent judgment of the Supreme Court of Canada in *Paul v. The Quee*n (1982), 67 C.C.C. (2d) 97, 138 D.L.R. (3d) 455, 42 N. R. 1, holds that Parliament has codified the powers to sentence consecutively and that therefore before a sentence can be ordered served consecutively to another sentence the express power to do so must be found in some federal enactment. *Code,* s. 645(4)(a) authorizes the imposition of consecutive sentences of imprisonment under certain circumstances. Section 83(2) of the *Code* provides that the mandatory jail sentence for the offence of using a firearm during the commission of an offence shall be served consecutively to any other sentence imposed for an offence arising out of the same event. Likewise, s. 137(1) provides that a term of imprisonment imposed for prison break may be ordered served consecutively with the term of imprisonment the accused was serving at the time of his escape.
>
> The foregoing instances authorizing the imposition of consecutive sentences relate only to sentences of imprisonment. There is no corresponding provision with respect to non-custodial sentences.
>
> [Emphasis added]

[59] Based on all of the foregoing, including Mr. Burns's youthfulness, lack of prior involvement with the criminal justice system, and time on strict pre-trial conditions (without incident), combined with his mental health challenges (which include his inability to access his necessary prescription ADHD medications), his chaotic living situation at the time of the offences, all leading to his low moral culpability, in the instant case, the appropriate sentence for Mr. Burns is a conditional discharge, with a period of 18 months' probation, with the following conditions:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;

3. Notify the Court or the Probation Officer in advance of any changes of name or address, and promptly notify the Court or the Probation Officer of any changes of employment or occupation.
4. Report in person to a probation officer at 161 Terra Cotta Drive, Suite 2, New Glasgow, Nova Scotia, 902-752-3273 no later than December 14, 2023, at 4:30pm.
5. Report to the court virtually every three (3) months or as directed by the court. Probation Services to provide a written report to the court for each conference.
6. Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer.
7. Stay away from the person, home and place of work or education of David and Sabrina Synder; C.E.S.; M.G. (aka M.G.); and T.M. and must have no contact or communication with them, directly or indirectly (this includes, but is not limited to, a total prohibition against contact by word of mouth, gesture, printed word, telephone, smartphone or other electronic communication, texting, any form of social media, or any communication done anonymously or through a third party), do not watch or beset their homes or places of employment, education or service, or follow them from place to place, even if invited to do so. No exceptions.
8. Attend for mental health assessment and counselling as directed by your probation officer.
9. Attend for substance use assessment and counselling as directed by your probation officer.
10. Attend for any other assessment, counselling or programming directed by your probation officer.
11. Complete 50 hours of community service within the first 8 months of probation

[60] Additionally, the ancillary DNA order requested by the Crown is granted. However, the victim fine surcharge is waived, considering Mr. Burns's financial situation.

Conclusion

[61] Justin Burns will receive a conditional discharge and is placed on probation for 18 months with the above-noted conditions. I also impose the DNA order requested by the Crown.

Arnold, J.