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IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

WILLIAM MATTHEW ANDERSEN

REASONS FOR SENTENCE
OF THE
HONOURABLE JUDGE J. DOULIS

Counsel for the Crown:	R. Elias
Appearing for the Accused:	K. Thomson
Place of Hearing:	Quesnel, B.C.
Date of Hearing:	April 27, 2021
Date of Sentence:	June 24, 2021

INTRODUCTION

[1] On March 30, 2021, after a one-day trial on March 11, 2021, I convicted William Matthew Andersen of assault causing bodily harm against Kirk Watkins. The circumstances of the offence are set out in my Reasons for Judgment indexed as *R. v. Andersen*, 2021 BCPC 72 (CanLII). In a nutshell, on the evening on December 1, 2019, Kirk Watkins was at [omitted for publication] Avenue, Quesnel, BC, the residence of J.A.M. J.A.M.'s former boyfriend William Andersen was also present. For a while, Kirk Watkins, J.A.M. and William Andersen had some drinks and watched a movie. Eventually, William Andersen went into the bedroom to nap and J.A.M. fell asleep on the couch. Kirk Watkins remained awake. William Andersen woke up before J.A.M. and emerged into the living room wearing only a shirt.

[2] William Andersen sat down beside J.A.M. where she was still sleeping on the couch. William Andersen started to undress her. Kirk Watkins protested and told him to stop. William Andersen pushed Kirk Watkins down and began pummelling him. Kirk Watkins lay on the floor on his back with his arms above his head, trying to protect himself from the blows. As a result of this unprovoked attack, Kirk Watkins suffered two black eyes, a swollen head, a cut on his right eye, a cut on his forehead and a cut on his left eye. William Andersen came before me for sentencing on April 27, 2021. At the conclusion of the sentencing hearing, I reserved my decision. These are my reasons for sentence.

ISSUE

[3] The issue for the court is to determine a fit and proper sentence taking into account the relevant purposes and principles of sentencing, the circumstances of the offence and the particular circumstances of the offender William Matthew Andersen. More specifically, the court must determine whether a conditional sentence order ("CSO") is appropriate in this case.

CIRCUMSTANCES OF THE OFFENDER

[4] Neither the Crown nor the defence requested any pre-sentence reports. I have only the submission of counsel to ascertain Mr. Andersen's personal circumstances.

[5] William Andersen is 58-years-old, born on February 24, 1963. He resides with his mother in Kersley, BC, a small rural community 18 kilometres south of Quesnel, BC. Mr. Andersen's mother is 83-years-old and relies on Mr. Andersen to assist with household chores.

CRIMINAL RECORD

[6] At the time of this offence, William Andersen had a criminal record extending back to September 9, 1986, consisting of 15 offences, three of which were crimes of violence. On August 3, 2018, William Andersen was convicted of assault causing bodily harm against an intimate partner in Court file 27126-1-K. At that time he received a 90-day CSO, followed by one-year probation, a five-year discretionary firearms prohibition and a DNA order. Mr. Andersen also has prior convictions for assault, one on August 3, 2018, for an offence which occurred on September 1, 2017, and one on December 4, 1991.

[7] Mr. Andersen also has convictions for breaching court orders on March 31, 2017, sand August 3, 2018. The three convictions on March 31, 2017, relate to Mr. Andersen breaching his bail condition on Court file 26185-1-K, that he have no contact with J.A.M. and abstain from consuming alcohol. On August 3, 2018, Mr. Andersen was convicted of breaching his bail conditions by consuming alcohol. On July 10, 2020, Mr. Andersen was convicted of breaching his December 10, 2019 bail conditions by attending at J.A.M.'s home and refusing to leave.

[8] Mr. Andersen also has a number of serious driving offences. Many of Mr. Andersen's convictions were for offences committed while intoxicated.

[9] Despite his conviction for multiple offences over many years, Mr. Andersen has served only one day in actual jail.

VICTIM IMPACT STATEMENT

[10] The Crown provided Kirk Watkins with a Victim Impact Statement form to complete and return, but he did not do so. Nevertheless, Kirk Watkins did testify as to the nature and extent of his injuries. He says he received 13 stitches to his facial wounds and continues to experience problems with his right eye to this day.

POSITIONS OF THE CROWN AND DEFENCE ON SENTENCING

[11] The Crown and defence do not agree on the appropriate sentence in terms of the duration of jail, probation and ancillary orders. They do not agree whether jail should be jail in the community or behind bars.

[12] The Crown seeks a period of incarceration of 9 to 12 months followed by two years' probation, a DNA order and a s. 110 discretionary firearms prohibition for five years. The defence seeks a conditional sentence order of 90 days or more.

[13] The Crown has provided the court with the following authorities, which I have reviewed. These cases involve an assault causing bodily harm on a stranger: (a) *R. c. Giraud,* 2020 QCCQ 2657, 2020 CarswellQue 7989 ("*Giraud*"); (b) *R v. Forsythe*, 2016 BCPC 202 ("*Forsythe*"); *R. v. MacDonald*, 2015 BCSC 2032 ("*MacDonald*"); and *R. v. Gray*, 2019 BCPC 281 ("*Gray*" - which was a conviction for the offence of unlawfully causing bodily harm, contrary to s. 269 of the *Criminal Code*).

[14] The defence did not provide the court with any case authorities.

LEGISLATIVE FRAMEWORK

[15] Section 267(b) of the *Criminal Code* in force at the time of the offence reads as follows:

> Assault with a weapon or causing bodily harm
>
> 267 Every person is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,
>
> **…**

(b) causes bodily harm to the complainant,

[16] In this case the Crown has proceeded summarily. Therefore, the maximum sentence provided in the *Criminal Code* for assault causing bodily harm at the time of this offence was 18 months in prison.

PURPOSE AND PRINCIPLES OF SENTENCING

[17] Section 718 of the *Criminal Code* sets out the fundamental purpose of sentencing, which is 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, to have one or more of the following objectives: (a) denunciation; (b) deterrence; (c) protection of the public; (d) rehabilitation of the offender; (e) reparation to victims; and (f) promotion of a sense of responsibility in the offender.

[18] In *R. v. Berner*, 2013 BCCA 188, at para. 9, the Court of Appeal stated “the purpose of sentencing is to protect the public through sanctions a court imposes upon a person found guilty of committing an offence. Each codified objective of sentencing is designed to further the protection of the community”.

[19] Section 718.1 of the *Criminal Code* codifies the proportionality principle, which requires the sentence to be proportionate to the gravity of the offence and the degree of responsibility of the offender. The gravity of the offence refers to what the offender did wrong. It includes two components: (a) the harm or likely harm to the victim; and (b) the harm or likely harm to society and its values: *R. v. Lacasse*, 2015 SCC 64 (CanLII), at para. 130.

[20] Other important sentencing considerations are set out in s. 718.2, which states a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[21] Section 718.2(b) codifies the parity principle which holds sentences should be similar to sentences imposed on similar offenders for similar offences in similar circumstances. In *R. v. Ipeelee*, 2012 SCC 13, at para. 79, the Supreme Court held that

the parity principle means “that any disparity between sanctions for different offenders be justified”.

[22] Sections 718.2(d) and 718.2(e) codify the restraint principle which holds an offender should not be deprived of liberty if less restrictive principles may be appropriate, and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

PARAMOUNT SENTENCING PRINCIPLES

[23] In *Berner*, the BC Court of Appeal stated (at para.11) that “broadly speaking, a sentencing judge looks to the conduct and culpability of the offender and punishes the offender for that conduct through the application of the principles and objectives of deterrence, rehabilitation, denunciation and proportionality”. In this case, the circumstances of this offence and this offender, priority must be given to the principles of denunciation and deterrence. Specifically, (a) the offence was a violent and unprovoked assault, involving William Andersen pushing Kirk Watkins onto his back, pinning him down and punching him about 20 times. Kirk Watkins did not or could not respond in kind or in self-defence; (b) Mr. Andersen has a recent and related criminal record; and (c) Mr. Andersen was 56-years-old at the time of this offence and Mr. Watkins was 66-years-old.

REHABILITATION

[24] Notwithstanding its diminished status, I must still give some weight to Mr. Andersen’s prospects for rehabilitation set out in s. 718(d) of the *Criminal Code.* In *R. v. Lacasse*, 2015 SCC 64, Wagner J. held at para. 4.

> [4] One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.

[25] In this case, the defence acknowledges Mr. Andersen's offending arises from his addiction to alcohol. Nevertheless, there is little if any evidence of Mr. Andersen taking any appreciable steps toward effecting his rehabilitation.

PARITY: RANGE OF SENTENCE

[26] In *R. v. Janzen*, 2015 BCSC 652, the BC Supreme Court noted that there is a wide range of sentences imposed for the offence of assault causing bodily harm. Whereas here the Crown has proceeded summarily, the range can be anything from a discharge, up to 18 months' imprisonment. Offences involving statutory aggravating factors, offences resulting in higher levels of injury and offences directed at vulnerable victims will attract more onerous sentences. The wide range of sentence for offences of assault causing bodily harm is attributable to the correctional imperative of sentence individualization, which requires a sentencing judge to tailor the sentence to fit the offender and the crime: *R. v. Knott*, 2012 SCC 42, at para. 47.

CROWN AUTHORITIES

***R. v. MacDonald*, 2015 BCSC 2032**

[27] In *MacDonald*, the 34-year-old offender was convicted of assault causing bodily harm to a stone paver. Apparently, Mr. MacDonald and his father were dissatisfied with the stone-paving work the victim had done on the father's property. They went to the victim's residence. Without warning, Mr. MacDonald struck the victim on the left side of the face with enough force to break his nose and the bony ridges above and below his left eye. The victim had to undergo surgery. He suffered ongoing headaches from the injury and the repair surgery continued to affect his work.

[28] Mr. MacDonald had a prior problem with drug and alcohol abuse and a related criminal record for assaults and breaches in the preceding four-to-five years. Unlike the case before me, Mr. MacDonald placed before the sentencing judge "moving" letters from his family attesting to Mr. MacDonald's skill as a father and his love for his children. The defence emphasized Mr. MacDonald's rehabilitation. Justice Fenlon, as she then was, found that Mr. MacDonald had made significant efforts to rehabilitate

himself in the prior year. Nevertheless, she also gave significant weight to the principles of denunciation and deterrence. She states at para. 17 of her reasons for sentence:

> [17] But rehabilitation is only one factor I must consider. I must also consider denunciation, deterrence and the protection of the community. Those are important considerations here as well. There are aggravating factors in this case. This was a senseless and brutal act, a sucker punch of a defenceless person which caused serious injury. There is a long record, 42 convictions, four of which are for assault. Mr. MacDonald committed the offence while on two probation orders for three separate earlier assaults.

[29] Justice Fenlon imposed a custodial sentence of nine months.

***R. v. Forsythe*, 2016 BCPC 202**

[30] In *Forsythe*, the 30-year-old offender was convicted after a trial of assault causing bodily harm. Mr. Forsythe had a serious criminal record for violence and breaches of court orders. He also had a history of substance abuse, anger-management issues and a personality disorder with narcissistic and anti-social traits. Mr. Forsythe took exception to the victim's driving in a parking lot. He spat on the offending vehicle and swore at the victim. When the victim got out of his vehicle to ask what was wrong, the offender struck the victim forcefully, causing him to fall. While the victim was on his hands and knees on the pavement, the offender kicked him in the face, then left the scene. The victim sustained a broken nose and a split lip requiring 28 stitches. Judge Challenger imposed a sentence of 18 months' imprisonment followed by three years' probation. She states:

> [32] I find the court must send a strong message to the community that striking another person in the head or face will result in a significant penalty. In my experience as a judge in the Provincial Court, many people suffer significant brain injuries and/or lose their lives from being punched and falling to the ground or being kicked or hit on the head with objects. Thus, the court must respond by imposing retributive consequences which properly reflect the offender's moral culpability, intentional risk-taking, the consequential harm which is caused, and the normative character of the offender's conduct; see *M.(C.A.)*, 1996 CanLII 230 (SCC) …
>
> [33] I further find that Mr. Forsythe's moral culpability for this offence is high. He committed an unprovoked attack in benign circumstances solely

> as a result of his own beliefs and perceptions. He was not suffering from any impairment of his faculties either by way of substance abuse or mental illness. The sudden punch followed by the gratuitous kick to Mr. Unger's face while he was on his knees was the result of Mr. Forsythe becoming enraged and making the choice to attack Mr. Unger solely because he felt disrespected by him. In my view, the unlawful conduct involved in this offence requires that it be clearly and firmly denounced and that the sentence imposed be one that will serve to deter others from engaging in similar conduct in the future.
>
> [34] I have found there has been no significant change in the beliefs, attitudes, and responses which contributed to Mr. Forsythe attacking Mr. Unger. In other words, he does not impress the court as having sincerely or fully accepted responsibility for his offence or as having developed insight into the harm he committed to Mr. Unger and to the community.

***R. v. Giraud*, 2020 QCCQ 2657**

[31] In *Giraud*, the 28-year-old offender was convicted after trial of attacking a 63-year-old man who was sitting on a park bench and refused to give Mr. Giraud a cigarette. Mr. Giraud, “upset that the victim refused to give him a cigarette, delivered a senseless “sucker-punch”-like blow to the unsuspecting man before fleeing from the scene as the victim lay on the ground bleeding with a gash on his head”. The victim was taken to the hospital where he received four stiches to his head. At sentencing, he still had a visible scar. Galiatsatos J.C.Q. stated at para. 58:

> It is clear from all the authorities that when dealing with a violent and unprovoked attack, the primary sentencing considerations are those of denunciation and deterrence.

[32] The sentencing judge, citing *Forsythe*, held that a blow directed to the victim’s head is aggravating because the head is the most vulnerable part of the body. Judge Galiatsatos went on to say (at para. 80) the fact Mr. Giraud chose to strike the victim on the head, as opposed to anywhere else on the body, has a significant impact on sentencing.

AGGRAVATING MITIGATING FACTORS AND COLLATERAL CONSEQUENCES

[33] As the sentencing judge, I must consider the gravity of the offences for which William Andersen is being sentenced, his degree of responsibility in their commission, having regard to his unique individual circumstances. This individualization in sentencing requires me to consider all aggravating and mitigating circumstances and the collateral consequences. An aggravating factor, either statutorily or judicially mandated, will induce a court to impose a longer sentence than otherwise may be imposed. A mitigating factor will reduce the sentence that might otherwise be imposed. The absence of an aggravating factor does not equate to a mitigating factor or *vice versa*. The Crown bears the burden of proving disputed aggravating factors beyond a reasonable doubt; the defence bears the burden of proving disputed mitigating factors on a balance of probabilities: *R. v. Dreger*, 2014 BCCA 54, para. 45.

MITIGATING FACTORS

[34] Neither the Crown nor the defence have identified any mitigating circumstances in this matter. At best, William Andersen recognizes he needs to seek treatment for his alcoholism.

[35] In *R. v. Badhesa*, 2019 BCCA 70, the BC Court of Appeal discussed the mitigating impact of mental illness and self-induced intoxication in the context of a manslaughter case. Justices Fenlon and Dickson, for the majority, stated at paras. 39 and 40 [citations omitted]:

> [39] Intoxication by alcohol or drugs often figures prominently in manslaughter cases. While relevant to moral culpability, self-induced intoxication that leads to violence is typically the product of intentional risk-taking, which conduct is itself dangerous, irresponsible and blameworthy. In such circumstances, the offender is held fully accountable for his or her condition and principles of deterrence and denunciation are paramount in the determination of a fit sentence. This is because the offending conduct encroaches on our society's basic code of values and warrants condemnation and punishment …
>
> [40] However, an offender's volitional and decision-making capacity in connection with self-induced intoxication and related violence may stem, at least in part, from mental illness or other cognitive disability. Depending

> on the circumstances, both the mental illness and related self-induced intoxication may reduce the offender's moral culpability. …

[36] In *Badhesa*, the appellant court went on to state in part:

> [42] When mental illness causes or contributes to the commission of an offence, it is a mitigating factor and a sentence may be reduced because the offender's moral culpability is attenuated. In these circumstances, general deterrence is a less weighty consideration because a mentally ill offender is not an appropriate medium for making an example to others. …

[37] The court requires evidence to show whether and to what extent the offender suffered from a mental illness when the offences occurred: *R. v. Milne,* 2021 BCCA 166 (CanLII), para. 45. In this case, I have no evidence Mr. Andersen currently suffers from any form of major mental illness. I have no evidence a mental illness contributed to his commission of the offence. If his thought processes were impaired at the material time, they were impaired by self-induced alcohol intoxication.

[38] I acknowledge in some circumstances that self-induced intoxication can be a mitigating factor in terms of reducing moral culpability. This attracts a contextual assessment: *R. v. Espinosa Ribadeneira*, 2019 NSCA 7.

[39] The evidence before me does not clearly depict William Andersen's level of intoxication at the time of the offence. Constable Smith was of the view that all the residents present at the crime scene ([omitted for publication] Avenue, Quesnel, BC) were heavily intoxicated. His evidence in this regard was merely a conclusory statement without elaboration. At trial, I did not find Kirk Watkins' level of intoxication impaired his ability to observe, recall and recount the events of that evening to the point of unreliability. I note the offence occurred shortly after William Andersen had woken up after a nap. I assume he was still experiencing the effects of his earlier consumption of alcohol, but I cannot say to what degree.

[40] Mr. Thomson suggests Mr. Andersen's involvement in the criminal justice system is linked to his alcohol misuse. Although I accept this to be the case, I cannot find

Mr. Andersen's degree of intoxication during the commission of the offence as mitigating. Specifically, I have no evidence upon which I can conclude that:

a. Mr. Andersen suffered from a mental illness which contributed to his excessive consumption of alcohol: *Badhesa, supra,* para. 35;

b. Mr. Andersen committed the offence as the result of an alcohol-induced delirium: *R. v. Espinosa Ribadeneira*, 2019 NSCA 7 (CanLII), at para. 79, citing *R. v. Hicks*, 1995 CanLII 705, (BCCA);

c. Mr. Andersen was acting out of character as the result of severe intoxication: *R. v*. *Espinosa Ribadeneira*, at para. 79; or

d. Mr. Andersen has addressed his alcohol abuse which led to the criminal conduct: *R. v. Espinosa Ribadeneira*, at para. 79.

[41] Accordingly, I do not find Mr. Andersen's moral blameworthiness or culpability was diminished as a result of his excessive consumption of alcohol. In fact, despite having identified alcohol consumption as the catalyst to his risk of reoffending, Mr. Andersen has not made any rehabilitative efforts.

AGGRAVATING FACTORS

[42] In this case, I find aggravating:

a. In his attack on him, William Andersen repeatedly punched Kirk Watkins in the head, which is an extremely vulnerable part of the human body. The courts recognize assaults of this nature is an aggravating factor: *Forsythe* and *Giraud;*

b. The bodily harm William Andersen caused to Kirk Watkins included two black eyes, a swollen head, lacerations on his right eye, forehead, and left eye, requiring a total of 13 stitches. Kirk Watkins was not fighting back during the commission of the offence. Kirk Watkins still suffers the lingering adverse impact of these injuries;

c. Kirk Watkins was acting as a good Samaritan when William Andersen assaulted him;

d. William Andersen has a prior criminal record for violent offences, the most recent of which occurred on August 3, 2018; and

e. William Andersen would have recently completed his one-year probation term on file 27126-1-K a month prior to the offence for which he is being sentenced today.

NEUTRAL FACTORS

[43] I find neither aggravating nor mitigating, but relevant:

a. William Andersen was convicted after a trial. William Andersen's lack of a guilty plea is not aggravating, but he is deprived of any potentially mitigating value that accompanies this manner of dealing with his charge: *R. v. Cowell*, 2019 ONCA 972 (CanLII), para. 102; and

b. William Andersen expressed no sincere remorse for the offence. Generally, lack of remorse is not an aggravating factor: *R. v. Zeek*, 2004 BCCA 42 at para. 24. However, a sentencing judge is entitled to consider an offender's lack of remorse when assessing the degree to which he poses a continuing risk to the public: *R. v. Alderman*, 2017 BCCA 26 (CanLII), para. 15. Also, there may be exceptional cases where a lack of remorse is indicative of a risk to the public and therefore becomes an aggravating factor: *R. v. Dreger*, 2014 BCCA 54, at para. 51.

COLLATERAL CONSEQUENCES

[44] The sentencing judge must also consider any collateral consequences arising from commission of an offence, the conviction for an offence, or the sentence imposed for an offence that impacts the offender: *R. v. Pham*, 2013 SCC 15, and *R. v. Suter*, 2018 SCC 34. The collateral consequences are not necessarily aggravating or mitigating factors under section 718.2(a) of the *Criminal Code* as they do not relate to the gravity of the offence or the level of responsibility of the offender. Nevertheless, they do speak to the personal circumstances of the offender. The consequences can flow from the function of legislation, or social, personal, or occupational implications. They sometimes result in disqualification from benefits or activities or other burdens and hardships that flow from a conviction. Collateral consequences cannot be used to reduce a sentence to a point where it becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender: *Suter*.

[45] Mr. Andersen seeks leniency on the basis that his elderly mother requires his assistance around the home. Offenders often ask the courts to consider the impact of the offender's sentence on their family. This is typically in issue when the offender is the

sole provider or caregiver for their family: see *R. v. Bunn*, 2000 SCC 9, at para 23; *R. v. Ellis*, 2013 ONCA 739 at para 77; and *Giraud*. In response to Mr. Giraud's mother's plea that she required her son to help at home, Judge Galiatsatos states at para. 114:

> [114] It is true that if he is incarcerated, he will no longer be available to help around the house. Nevertheless, as Steinberg J.A. expressed in *R.* v. *Gauthier*, "if as a result of [the accused's] imprisonment others suffer and more harm is done, that is attributable to the conduct of [the accused] and not the severity of the law". [*R. v. Newson*, 2008 BCCA 28, at para. 18] Those who are entrusted with various family responsibilities are no less responsible for their acts. In fact, it is often the case that an accused's criminal offending creates hardship for members of the family. That is one of the hard realities of the situation created by Mr. Giraud. … It does not warrant any downwards adjustment of his sentence; it does not diminish the seriousness of his crime or detract from the need to impose a sentence that adequately denounces his conduct, nor does it reduce his personal culpability [*R. v. Spencer*, (2004), CanLII 5550 (ON CA) … at paras. 46-47, leave to appeal denied, [2005] S.C.C.A. No. 4]

[46] In *R. v. Webster*, 2016 BCCA 218 (CanLII), Frankel J.A. for the unanimous court stated at para. 45, "the impact a custodial sentence has on an offender's family is an unavoidable consequence of criminal activity".

[47] The defence has provided the court with no information about Mr. Andersen's role in caring for his mother or what other resources are available to her. I gather if he is as addicted to alcohol as the defence suggests, then he would likely be of limited assistance.

DECISION ON SENTENCE

[48] In this case, the defence submits the step-up principle ought to be applied. In *R. v. Kory*, 2009 BCCA 146, Ryan J.A. explained the "step-up" principle as follows:

> [6] .. The "step-up principle" is not a principle or goal set out in the *Criminal Code*. It is a short hand way of expressing the idea that sentencing requires a measured approach, even for repeat offenders. As Mr. Justice Lambert put in *R. v. Robitaille*, 1993 CanLII 2561 (BCCA) …
>
> > [8] In relation to that argument, I say that the theory that sentences should go up only in moderate steps is a theory which rests on the sentencing principles of rehabilitation. It

> should be only in cases where rehabilitation is a significant sentencing factor. So the conclusion, in any particular case, that the increase in sentence should not be too large rests on a consideration of the circumstance of the particular offender and a desire not to discourage any effort he may be making to rehabilitate himself by the imposition of a sentence that may be seen by him to be a dead weight on his future life.
>
> …
>
> Thus, to achieve the goals of specific deterrence and rehabilitation it often is unnecessary to do more than increase punishment incrementally when an offender is engaged in repetitive offending. However, the step-up principle should be applied where the circumstances call for it.

[49] In *R. v. Drake*, 2019 BCCA 170 (CanLII), the Court of Appeal found the step-up principle had no significant application in the case before it. The court stated:

> [13] Turning to the submission that the judge imposed a disproportionate step-up, we agree with the Crown that the step-up principle has no significant application here. It applies generally where an offender's rehabilitation is a significant factor. Here it is not; on the contrary, as the judge concluded, denunciation, deterrence and the need to separate this offender from society are the more significant factors in this case.
>
> [14] In *R. v. Louie*, 2017 BCCA 218, Justice Fitch discussed the "step-up" principle at para. 24:
>
> > [T]he step-up principle embodies restraint by requiring, as a general rule, that sentences for repeat offenders go up in moderate steps so as not to discourage rehabilitative efforts: *R. v. Kory*, 2009 BCCA 146 at para. 6. The step-up principle is not of great assistance in a case of this kind where an offender with a lengthy record of related behaviour for which he or she has received consistently low sentences has been undeterred by previous sanctions and has failed to benefit from previous interventions designed to ameliorate the risk of re-offence.

[50] In this case, I find the principles of denunciation, deterrence and protection of the public are paramount, hence the step-up principle ought to be given little weight. I say this because Mr. Andersen is 58 years old. He has a recent and relevant criminal record. He has expressed no remorse and has not taken any steps towards his

rehabilitation. I have no evidence to suggest Mr. Andersen is genuinely prepared to undergo treatment for his alcohol addiction.

Issue: What is a fit and proper sentence for William Matthew Andersen?

[51] In my view the appropriate range of sentence is broader than that sought by the Crown. I find a fit sentence for William Matthew Andersen is six months' jail (180 days) followed by 18 months' probation and the ancillary orders the Crown seeks. The question remains is whether Mr. Andersen ought to serve his jail sentence in the community or behind bars.

CONDITIONAL SENTENCE

[52] A conditional sentence is a sentence of imprisonment served in the community under strict conditions. Its purpose is to give effect to the principle of restraint in the use of incarceration as a sanction and increase the restorative justice objectives of rehabilitation, reparations to the victim and community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community: *R. v. Proulx,* 2000 SCC 5 (CanLII), para. 9.

[53] Section 742.1 sets out the following prerequisites for the imposition of a conditional sentence:

> a. the conditional sentence must be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2;
> b. the court must impose a sentence of imprisonment that is less than two years;
> c. the safety of the community would not be endangered by the offender serving the sentence in the community;
> d. the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
> e. the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
> f. the offender must be convicted of an offence that is not specifically excluded. For example, the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that resulted in bodily harm;

[54] Neither party has an onus of establishing the offender should or should not receive a conditional sentence. Instead, the judge must take into consideration all of the evidence in order to determine whether it is an appropriate sanction.

[55] The sentencing judge must give serious consideration to the imposition of a conditional sentence where the statutory pre-conditions have been met: *Proulx; R. v. Lynch*, 2015 BCCA 140. Except for offences specifically excluded, there is no presumption in favour of or against the imposition of a conditional sentence. A conditional sentence, however, must be a real alternative to a jail sentence and not merely a substitute for community-based sanctions such as fines and probation.

[56] In *Proulx,* the Supreme Court set out a two-stage process for deciding whether to impose a conditional sentence. In the first stage, a judge sentencing an offender for a *Criminal Code* offence must consider: (a) whether a suspended sentence or a fine is inappropriate; (b) the range of sentence is less than two years; and (c) whether the offence is not excluded by s. 742.1. If these preconditions are satisfied, then the judge is required to consider a conditional sentence: *R. v. Wells,* 2000 SCC 10, para. 27.

[57] After a preliminary assessment, I find the stage-one factors are satisfied. Specifically:

a. a suspended sentence in the circumstances of this case and this offender is not appropriate. This was a serious assault. It was in no way trifling and the injuries Kirk Watkins sustained were not minor;
b. the Crown elected to proceed by way of summary conviction, effectively capping the available incarceral sentence at 18 months;
c. assault causing bodily harm is not punishable by a minimum term of imprisonment; and
d. assault causing bodily harm is not otherwise an excluded offence under s. 742.1 where the Crown has proceeded summarily.

[58] Given a conditional sentence of imprisonment to be served in the community is legally available to Mr. Andersen, I will now consider whether he ought to serve his sentence in the community. At this second stage, I must consider (a) the safety of the

community; and (b) the fundamental purpose and principles of sentencing set out in ss.718 and 718.2.

Does the safety of the community preclude a conditional sentence?

[59] The safety of the community requires me to weigh the risk that William Andersen will reoffend and the gravity of the consequences of reoffending.

[60] It bears reiteration that in an unprovoked violent attack, William Andersen punched Kirk Watkins on the head repeatedly. William Andersen has a record for violent offences and for offences against the administration of justice. At the time he committed the offences for which he is being sentenced, William Andersen would have just finished his probation order on which he was placed on August 3, 2018, after being convicted for assault causing bodily harm.

[61] Although a record for breaching previous court orders may weigh against the imposition of a conditional sentence, it is not an absolute bar.

[62] The Supreme Court of Canada in *Proulx* provided the court with guidance on assessing the risk to the community when considering a conditional sentence:

> [127] …
>
> 6. The requirement in s. 742.1(*b*) that the judge be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence, and not the primary consideration in determining whether a conditional sentence is appropriate. In making this determination, the judge should consider the risk posed by the specific offender, not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community by providing insufficient general deterrence or undermining general respect for the law. Two factors should be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. A consideration of the risk posed by the offender should include the risk of any criminal activity, and not be limited solely to the risk of physical or psychological harm to individuals.

[63] Chief Justice Lamer in *Proulx* states at paras. 72 and 73 [citations omitted]:

> [72] The risk of re-offence should also be assessed in light of the conditions attached to the sentence. Where an offender might pose some risk of endangering the safety of the community, it is possible that this risk be reduced to a minimal one by the imposition of appropriate conditions to the sentence … Indeed, this is contemplated by s. 742.3(2)(*f*), which allows the court to include as optional conditions "such other reasonable conditions as the court considers desirable … for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences". For example, a judge may wish to impose a conditional sentence with a treatment order on an offender with a drug addiction, notwithstanding the fact that the offender has a lengthy criminal record linked to this addiction, provided the judge is confident that there is a good chance of rehabilitation and that the level of supervision will be sufficient to ensure that the offender complies with the sentence.
>
> [73] This last point concerning the level of supervision in the community must be underscored. As the Alberta Court of Appeal stressed in *Brady*, *supra*, at para. 135:
>
> > A conditional sentence drafted in the abstract without knowledge of what actual supervision and institutions and programs are available and suitable for this offender is often worse than tokenism: it is a sham.
>
> Hence, the judge must know or be made aware of the supervision available in the community by the supervision officer or by counsel. If the level of supervision available in the community is not sufficient to ensure safety of the community, the judge should impose a sentence of incarceration.

[64] William Andersen acknowledges that he ought to attend counselling for alcohol and substance abuse and anger management. However, William Andersen was required by the terms of his 90 day conditional sentence and one year probation imposed on August 3, 2018, in Court File 27126-1-K to:

> attend, participate in and successfully complete any intake, assessment, counselling or program as directed by the conditional sentence / probation officer. Without limiting the general nature of this condition, the intakes, assessments, counselling or programs may relate to: a) anger management. b) alcohol or drug abuse. c) spousal abuse prevention.

[65] Mr. Andersen does not offer any explanation why the counselling he presumably underwent in 2018 and 2019 utterly failed in its rehabilitative objective. Mr. Andersen acknowledges the causal link between his offending and substance misuse.

Nevertheless, he has not presented the court with any concrete proposal for a more intense treatment program. His conduct, character and attitude is not that of an offender well along the path to rehabilitation.

[66] I have no information as to the level of police supervision in Kersley, where Mr. Andersen says he will reside with his elderly mother. Given Mr. Andersen's lack of remorse and underwhelming rehabilitative efforts to date, I am unable to say that Mr. Andersen does not pose a danger to the community. To the contrary, I find there is a significant risk that Mr. Andersen will commit a further violent offence while intoxicated thereby endangering the safety of the community.

Do the fundamental purpose and principles of sentencing militate against jail in the community?

[67] The offence of assault causing bodily harm is a serious offence giving prominence to the principles of denunciation and deterrence. This is particularly so in this case given the number of aggravating factors and dearth of mitigating factors. In my view the gravity of the offence and Mr. Andersen's degree of responsibility militate against jail in the community. The objectives of restorative justice do not weigh as favourably as those of separation, denunciation and deterrence.

Issue: Where should William Andersen serve his jail sentence?

[68] The Crown submits William Andersen ought to serve his jail sentence behind bars. Mr. Elias cites this Court's decision in *Gray* in support of this position. The defence submits William Andersen ought to serve his sentence in the community where he can access the resources he will need to address his alcohol addiction.

[69] Given Mr. Andersen's ineffective efforts at rehabilitation to date, his record for violent offences and breaching court orders, I am not persuaded he ought to serve his jail sentence in the community. On December 1, 2019, Mr. Andersen had just completed a CSO with probation for the offence of assault causing bodily harm. I find the Defence's proposal for a CSO of a slightly longer duration than that imposed by this Court on August 3, 2018, is too lenient. Firstly, I am not persuaded a CSO would

provide adequate protection for the community. Secondly, a CSO would not be consistent with the sentencing principles identified in s. 718-718.2 of the *Criminal Code.* Specifically, it would not sufficiently take into account the seriousness of the offence, Mr. Andersen's recent prior conviction for the same offence, his degree of responsibility, the consequences to the victim, and the sentencing objectives of denunciation and deterrence.

SENTENCING ORDERS

[70] William Matthew Andersen, with respect to Count 1 on Information 27956-1 charging you on December 1, 2019, at or near Quesnel, BC, with assault causing bodily harm to Kirk Watkins, contrary to Section 267(b) of the *Criminal Code*, I sentence you to 180 days' incarceration, less time served. As you have not spent any time in pre-sentence custody, you have the full 180 days jail left to serve on this matter.

[71] Upon your release from custody you will be subject to 18 months' probation, with following terms and conditions:

a. You must keep the peace and be of good behaviour.
b. You must appear before the court when required to do so by the court.
c. You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.
d. You must have no contact or communication, directly or indirectly, with Kirk Watkins except with a further order of this court.
e. You must not go to any place where Kirk Watkins lives, works, attends school, worships, or happens to be. If you see him, you must leave his presence immediately without any words or gestures.
f. You must report in person to a probation officer at Quesnel Community Corrections at 208-350 Barlow Avenue, Quesnel, BC, V2J 2C2, (250) 992-4258 or 1-877-992-4258, within two business days after your release from custody unless you have obtained, before your release from custody, written permission from the probation officer to report elsewhere or within a different timeframe. After that, you must report as directed by your officer.

g. When first reporting to the probation officer, you must inform him or her of your residential address and phone number. You must not change your residence or phone number without providing written notice to your probation officer.

h. You must not possess, either personally or through another person, any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance, anything that resembles a weapon or firearm, any weapon as defined in section 2 of the *Criminal Code,* or any related authorizations, licenses, or registration certificates.

i. You must not possess any knife, except for the immediate preparation or eating of food, or for purposes directly and immediately related to your employment.

[72] William Matthew Andersen, Count 1 on Information 27956-1, is a *primary* designated offence. Pursuant to section 487.051(1), I make an order in Form 5.03 authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Databank. The samples will be taken from you while you are in jail and you must submit to the taking of the samples.

[73] Also on Count 1, Information 27956-1, I make an order pursuant to s. 110 that you are prohibited from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, and explosive substance for five years.

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The Honourable Judge J.T. Doulis
Provincial Court of British Columbia