**IN THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR**
**JUDICIAL CENTRE OF CORNER BROOK**

**Citation: *R. v. Putt,* 2013 PCNL 1312A00704**
**Date: June 20, 2013**

**HER MAJESTY THE QUEEN**

**V.**

**STEPHEN PAUL PUTT**

---

**Before: The Honourable Judge Wayne Gorman**

---

**Place of Hearing:** Corner Brook, NL.
**Hearing Date:** June 18, 2013.

**Summary:** The accused was sentenced to a period of six months imprisonment, minus twenty-three days credit for pre-sentence custody, for the offences of uttering a threat to harm a person, to damage property, to kill an animal and failing to comply a probation order, contrary to sections 264.1(1)(a), (b), (c) and 733.1(1) of the *Criminal Code of Canada*, RSC 1985.

**Appearances:**
Ms. L. St. Croix counsel for Her Majesty the Queen.
Mr. J. Luscombe counsel for Mr. Putt.

**CASES CONSIDERED:** ***R. v. Bradbury***, 2013 BCCA 280, ***R. v. Nickles***, 2013 BCCA 151, ***R. v. Pham***, 2013 SCC 15, ***R. v. Peddle***, 2013 CanLII 33280 (NL PC), ***R. v. Dobbin***, [2013] N.J. No. 129 (P.C.), ***R. v. Stewart***, 2012 NLTD(G) 187, ***R. v. Delaney***, [2012] N.J. No. 459 (P.C.), ***R. v. Halleran***, 2013 CanLII 13309 (NL PC), ***R. v. Dicker***, 2013 CanLII 13200 (NL PC), ***R. v. Philpott***, [2011] N.J. No. 71 (S.C.), ***R. v. Young***, [2012] N.J. No. 166 (P.C.), ***R. v. Freake***, 2012 NLCA 10, ***R. v. Petravic***, [2001] O.J. No. 2766 (S.C.J.), ***R. v. Lyver***, [2011] N.J. No. 320 (P.C.), ***R. v. White***, [2012] N.J. No. 263 (P.C.), ***R. v. Crocker*** (1991), 93 Nfld. & P.E.I.R. 222

(N.L.C.A.), ***R. v. C.A.M.***, [1996] 1 S.C.R. 500, ***R. v. Squires***, [2012] N.J. No. 101 (C.A.), ***R. v. Lewis***, 2012 NLCA 11, ***R. v. Lyver***, [2010] N.J. No. 92 (P.C.), ***R. v. Hutchings***, [2012] N.J. No. 12 (C.A.), ***R. v. Tilley***, [2012] N.J. No. 413 (P.C.) and ***R. v. Barrett***, [2012] N.J. No. 234 (C.A.).

**STATUTES CONSIDERED:** The *Criminal Code of Canada*, RSC, 1985.



## JUDGMENT OF GORMAN, P.C. J.
## (SENTENCE)

**INTRODUCTION:**

[1] Mr. Putt has pleaded guilty to the offences of uttering a threat to harm a person, to damage property, to kill an animal (a snake) and to having failed to comply with a probation order, contrary to sections 264.1(1)(a), (b), (c) and 733.1(1) of the *Criminal Code of Canada*, RSC 1985. The Crown proceeded by way of summary conviction in relation to each charge. The sole issue for determination is the imposition of an appropriate sentence for these offences. For the reasons that will follow, I have concluded that this is an appropriate case for the imposition of a period of six months incarceration, minus twenty-three days credit for pre-sentence custody, followed by a period of probation of twelve months. Let me explain my reasons for this conclusion by commencing with a review of the circumstances of the offences committed by Mr. Putt.

## THE CIRCUMSTANCES OF THE OFFENCES

[2] On September 13, 2012, Ms. Jaclyn Pope was dropping off her boyfriend (Mr. Christopher Butt) at his residence in Pasadena when Mr.

Putt, who was standing nearby, began yelling and screaming at both of them. Mr. Putt called her a "slut" and both of them "rats." He asked them if they wanted some "cheese." Mr. Putt threatened to "slit" their throats, to kill their pets, to break all the windows in Ms. Pope's motor vehicle and to "blow up" Mr. Butt's apartment.

[3] Mr. Putt retrieved a baseball bat from the pan of a truck and began swinging it. He moved toward Ms. Pope and Mr. Butt and threatened to break their legs.

[4] At the time, Mr. Putt was subject to a probation order issued on May 31, 2012, as a result of having been convicted of the offence of uttering a threat. Sentence was suspended and Mr. Putt was placed on probation for a period of twelve months. The probation order required that he "keep the peace and be of good behaviour."

[5] Mr. Putt was arrested on September 13, 2012. On September 17, 2012, he was denied judicial interim release by the Provincial Court of Newfoundland and Labrador. Mr. Putt sought judicial review in the Supreme Court of Newfoundland and Labrador and was released by that Court on October 5, 2012. Mr. Putt spent twenty-three days in pre-sentence custody.

## THE CIRCUMSTANCES OF THE OFFENDER

[6] Mr. Putt is forty-two years of age. He was born in Corner Brook and is the second youngest of ten children born to Norman and Shirley Putt of Pasadena. Mr. Putt indicated to the author of the pre-sentence report that feels that he was the "black sheep" of the family and that he "was the target of his father's abuse to a much greater degree than his siblings." He also indicated that he felt that "he could 'never do anything right' and that 'he could never please' his father ('and still can't')."

[7] Mr. Putt is unemployed. He advised the author of the pre-sentence report that he "injured his back in a car accident many years ago and as a result has been unable to work on a consistent or regular basis. Instead he relates that he supplements his social assistance by working at odd 'cash' jobs such as 'roofing every now and then', mowing grass, shoveling snow, etc."

[8] The pre-sentence report notes that though Mr. Putt admits that he committed the present offences he "tends to rationalize and, to some extent shift responsibility for his actions. He adds that he was angry, that he often 'shoots off his mouth' without thinking but 'wouldn't act on it'. In hindsight he displays some regret for his behaviour."

[9] Mr. Putt indicated to the author of the pre-sentence report that "he started drinking and using marijuana when he was 16-17 but on an occasional, sporadic basis for the first couple of years." The report notes that Mr. Putt indicated "that he was accepted into detox and/or rehab programs when he lived in Ontario. He adds that he either dropped out prior to completion or was not admitted due to his continued alcohol and/or drug use. He also indicates that he attended a few AA meetings in that province. The accused states that he has never attended substance abuse counselling in this province but is aware of programming, such as Addictions Services and Humberwood."

[10] Mr. Putt has a criminal record. It consists of fourteen convictions over the time period of 1995 to 2012. He has a prior conviction for having uttered a threat, three prior convictions for the offence of assault and eight prior convictions for having breached court orders.

[11] The pre-sentence report concludes as follows:

> The accused's attitude has already been discussed. He is a repeat older offender who has been supervised by this office on a number of occasions. His reporting was mixed, in that he missed a number of appointments for various reasons. To be fair some of these were work related. The number of prior breaches and the repeat nature of the present offence (he is presently being supervised for an uttering threats conviction in 2012) raise obvious concerns as to the efficacy of community supervision. Mr. Putt states that he has complied with his present curfew since October and his sister generally confirms this

> statement. Ms. Putt also states that she has seen some positive changes in her brother since he was arrested for the present matters.
>
> Community supervision, if deemed appropriate by the Court, would focus on the issues raised in the previous section, more appropriate problem solving, coping skills and long term education and employment issues. Considering all of the above, Mr. Putt is deemed a suitable candidate for community supervision.



## THE POSITIONS OF THE PARTIES

**THE CROWN:**

[12] The Crown seeks a period of three to four months incarceration, followed by a period of probation. Ms. St. Croix referred to Mr. Putt's criminal record and the circumstances of the offences in support of her position. Ms. St. Croix argued that the sentence imposed must protect the public from Mr. Putt and that the Court should place its primary emphasis on specific deterrence.

[13] Ms. St. Croix relied upon my decision in ***R. v. Dobbin***, [2013] N.J. No. 129 (P.C.), and argued that what occurred here involves more serious criminal activity. In ***Dobbin***, the offender had threatened a social worker and breached a probation order. I imposed a period of forty-five days imprisonment to be served on an intermittent basis. Mr. Dobbin had a criminal record, but it was not as extensive as Mr. Putt's.

**MR. PUTT:**

[14] Mr. Putt sought the imposition of a conditional period of imprisonment in the range of forty-five to sixty days in length. Mr. Luscombe referred to Mr. Putt's pleas of guilty; his attempts to deal with his addiction issues; and Mr. Putt having complied with his present recognizance, in support of his submission.

[15] Mr. Luscombe referred to the fact that when Mr. Putt was yelling at Ms. Pope, she was yelling back at Mr. Putt. However, I do not see this as a mitigating factor. Ms. Pope was involved in an innocuous and peaceful activity; when Mr. Putt began to not only yell at her, but to threaten her, her boyfriend, her property and their pets. Ms. Pope's response to Mr. Putt's aggressive behaviour does not lessen in the slightest Mr. Putt's responsibility for his offences.

**THE PRINCIPLES OF SENTENCING**

[16] Section 718 of the *Criminal Code* states that the fundamental purpose of sentencing "is to contribute...to respect for the law and the maintenance of a just, peaceful, and safe society." This is to be achieved by imposing sentences which have, among other objectives, the objectives of:

-separating offenders from society, where necessary;

-denouncing unlawful conduct;

-general deterrence;

-rehabilitation; and

-the promoting of a "sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community."

[17] Section 718.2(b) of the *Criminal Code* states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."

[18] Section 718.1 of the *Criminal Code* states that any sentence imposed must be "proportionate to the gravity of the offence and the degree of responsibility of the offender."

[19] Section 718.2(a) of the *Criminal Code* indicates that a "sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender."

[20] Section 718.2(d) states that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and section 718.2(e) states that "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."

[21] In ***R. v. Pham***, 2013 SCC 15, the Supreme Court of Canada noted that it "has repeatedly emphasized the value of individualization in sentencing."

**SENTENCING PRECEDENTS-THREATS TO KILL OR HARM A PERSON-SECTION 264.1(1)(a)**

[22] In ***R. v. Lyver***, [2010] N.J. No. 92 (P.C.), I considered a number of sentencing precedents for the offence of uttering threats and noted, at paragraph 41, that a broad range had developed:

> For the offence of uttering threats, not involving an intimate relationship, the range of sentence extends from a conditional discharge (see *R. v. L.H.B.* (2006), 257 Nfld. & P.E.I.R. 307 (N.L.S.C.)) to three years imprisonment (see *R. v. Janes* (1999), 170 Nfld. & P.E.I.R. 269 (N.L.C.A.)). Periods of imprisonment of fourteen days (see *R. v. Lewis* (2002), 212 Nfld. & P.E.I.R. 145 (N.L.S.C.)); one month (see *R. v. H.P.* (1995), 133 Nfld. & P.E.I.R. 20 (N.L.C.A.) and *R. v. Ryan* (2006), 261 Nfld. & P.E.I.R. 326 (N.L.S.C.)); two months (see *R. v. Sheppard* (2003), 220 Nfld. & P.E.I.R. 299 (N.L.C.A.); *R. v. Savchenko* (2000), 191 Nfld. & P.E.I.R. 225 (N.L.S.C.) and *R. v. Stacey*, [2010] N.J. No. 55 (P.C.)); three months (see *R. v. Cormier* (2005), 245 Nfld. & P.E.I.R. 271 (N.L.S.C.); *R. v. Rowbottom*, [2006] N.J. No. 31 (P.C.) and *R. v. Eveleigh*, [2007] N.J. No. 411 (P.C.)); four months (see *R. v. Pumphrey* (1995), 127 Nfld. & P.E.I.R. 286 (N.L.C.A.)); and six months (see R. v. J.R.B., [2004] N.J. No. 101 (P.C.) and *R. v. Hunt* (2007), 273 Nfld. & P.E.I.R. 308 (N.L.S.C.)) have been imposed.

[23] Though the Court of Appeal upheld the period of three years imprisonment imposed by the trial judge in ***Janes***, for the offence of uttering a threat, it was the totality issue that the Court of Appeal concentrated upon. Thus, though the range of sentence for a breach of section 264.1(1)(a) of the

*Criminal Code* extends to three years imprisonment, none of the other sentencing precedents referred to in ***Lyver*** or set out here have resulted in the imposition of a period of imprisonment greater than six months being imposed.



[24] In ***R. v. Philpott***, [2011] N.J. No. 71 (S.C.), the accused was convicted of the offences of assault with a weapon and uttering a threat to cause death or bodily harm to his brother. The facts were described as follows:

> Gilbert Philpott, in response to his brother unplugging his stereo while he was trying to listen to it, picked up a bread knife and, in an attempt to get his brother to leave his apartment, swung the knife at him cutting both of his brother's hands. His brother was holding up his hands by his face at the time attempting to fend off any assault. The brother required stitches to his hands and had surgery for an injury to his left hand thumb. While medical treatment for injuries was required, there was minimal time spent at the hospital totalling approximately one day.

[25] Mr. Justice LeBlanc imposed a period of fifteen months incarceration, which included a period of one month incarceration for the uttering a threat offence. Mr. Justice LeBlanc agreed with the range of sentence I set out in ***Lyver***.

[26] In ***R. v. Young***, [2012] N.J. No. 166 (P.C.), the accused pleaded guilty to the offences of refusing to comply with a breathalyzer demand, flight from the police and two counts of uttering threats. The offender had a

related and lengthy criminal record. Judge Mennie imposed a period of fifteen months imprisonment, which included periods of one month imprisonment for each of the uttering threats offences.



[27] In ***R. v. Freake***, 2012 NLCA 10, the offender threatened the complainant and her child. While speaking to a social worker, he said: "I had a mind to go down and chop [the complainant] and her baby up and put them in a suitcase like [a person charged with having committed such an offence]." The trial judge imposed a period of one year imprisonment. On appeal, this was reduced to two months imprisonment. The Court of Appeal concluded as follows: (at paragraph 36):

> An appropriate sentence would be two months for each offence taking into account the need for specific deterrence, but recognizing that Mr. Freake is still a young man with prospects for rehabilitation. However, the sentences for the two offences should run concurrently. The two convictions for uttering threats relate to the same words said at the same time. Separate charges were laid based on the fact that the threat was made against both the complainant and her child. However, the threats constituted a single criminal adventure. Accordingly, the sentence for the second conviction is properly made concurrent with the sentence for the first.

**SENTENCING PRECEDENTS-THREATS TO DAMAGE PROPERTY- SECTION 264.1(1)(b)**

[28] In ***R. v. Petravic***, [2001] O.J. No. 2766 (S.C.J.), the accused, after visiting the constituency office of his Member of Parliament, threatened to

burn down the office. The trial judge suspended sentence and imposed a period of two years probation. On appeal, the sentence was affirmed.

**SENTENCING PRECEDENTS-THREATS TO KILL OR HARM AN ANIMAL- SECTION 264.1(1)(c)**

[29] In ***R. v. Lyver***, [2011] N.J. No. 320 (P.C.), the offender was convicted of an offence contrary to section 264.1(1)(c) of the *Criminal Code*. He threatened to kill his neighbour's dog. I suspended sentence and imposed a period of twelve months probation.

[30] In ***R. v. White***, [2012] N.J. No. 263 (P.C.), the offender was convicted of a number of offences, including the offence of threatening to kill his former girlfriends' cats. I imposed a period of six months imprisonment, which included a period of two months imprisonment for the offence of having uttering a threat to kill an animal.

[31] These precedents illustrate that a "prescriptive range" of sentence has not been established. Though the range is broad and periods of probation have been imposed, sentences of one to six months imprisonment would also be within the range for the offence of uttering a threat. But, this does not mean that a period of imprisonment must be imposed in every case in which this offence is committed or that the range has been capped at six months imprisonment.

## THE OFFENCE OF BREACH OF PROBATION

[32] In ***R. v. Hutchings***, [2012] N.J. No. 12, the Court of Appeal indicated that the range of sentence for the offence of breach of probation "can range between one month and sometimes less to upwards of six months. See *Murphy* (six months); *Oxford* (three months). In *Oxford*, the Court accepted statements in prior cases that sentences for non-compliance with probation orders could be one month or less even where there are prior convictions."

[33] In ***R. v. Tilley***, [2012] N.J. No. 413 (P.C.), the accused was convicted of a number of offences, including the offence of breach of probation. For the latter offence, a period of three months incarceration was imposed.

[34] In ***R. v. Barrett***, [2012] N.J. No. 234, the Court of Appeal reduced a sentence imposed for the offence of breach of probation from three months incarceration to one month incarceration.

[35] In ***R. v. Stewart***, 2012 NLTD(G) 187, a period of thirty days incarceration was imposed for the offence of breach of probation.

[36] In ***R. v. Delaney***, [2012] N.J. No. 459 (P.C.), the accused pleaded guilty to the offences of robbery, possession of stolen goods, breach of probation, breach of undertaking and unlawfully being in a dwelling-house. A period of three years imprisonment was imposed, which included a period of thirty days imprisonment for the breach of probation offence.

[37] In ***R. v. Halleran***, 2013 CanLII 13309 (NL PC), the accused pleaded guilty to the offences of aggravated assault, discharging a firearm with intent to endanger, breach of probation and breach of undertaking. The accused shot the victim in the in the leg and stabbed him multiple times during a drug transaction. A period of seven years imprisonment, minus a credit for time served, was imposed. For the breach of probation offence, a period of thirteen days imprisonment was imposed.

[38] In ***R. v. Dicker***, 2013 CanLII 13200 (NL PC), the accused, an aboriginal offender, was convicted of the offences of aggravated assault and breach of probation. He stabbed the victim in the chest. A period of seven months incarceration was imposed, which included a period of one month for the breach of probation offence.

[39] As ***Hutchings*** illustrates, a prescriptive range of sentence has been set for the offence of breach of probation, at the higher end of the range. The imposition of periods of imprisonment from one to three months for the offence of breach of probation is within the range of sentence for that offence, but that does not mean that a period of imprisonment must always be imposed for this offence.

## ANALYSIS

[40] Mr. Putt, while holding a baseball bat in his hand, threatened to kill two people, to damage their property and to kill their pets. At the time he was bound by a probation order for the offence of uttering a threat. Mr. Putt's actions constituted a public display of violent behaviour and distain for the court order he was bound by at the time. Mr. Putt has prior convictions for violent offences and for having breached court orders. However, he has pleaded guilty and he has taken steps toward rehabilitation.

[41] Considering the nature of the offences and Mr. Putt's related criminal record, I conclude that the public requires protection from him. The Court must denounce his violent conduct and attempt to deter him and others from such violent criminal activity.

[42] I conclude that for the individual offences committed by Mr. Putt the following individual sentences are appropriate:

(1) for threatening to kill Mr. Butt and Ms. Pope, a period of three months imprisonment;

(2) for threatening to damage the property of Mr. Butt, a period of two months imprisonment;

(3) for threatening to kill an animal belonging to Mr. Butt, a period of two months imprisonment; and

(4) for breaching the probation order, a period of three months imprisonment.

[43] The next question is: should these periods of imprisonment be ordered to be served on a consecutive or a concurrent basis?



## CONCURRENT OR CONSECUTIVE SENTENCES

[44] In ***R. v. Crocker*** (1991), 93 Nfld. & P.E.I.R. 222 (N.L.C.A.), it was held that "consecutive sentences should be imposed unless there is a valid reason not to do so. Each sentence should be an appropriate one for the offence. Concurrent sentences may, but are not required to be, imposed where multiple convictions arise out of several offences which constitute a single criminal adventure, and may also be imposed to achieve proper totality for multiple convictions."

[45] In ***R. v. Lewis***, 2012 NLCA 11, at paragraph 78, the Court of Appeal, per Wells J.A., indicated that "a sentence for breach of probation and, in my view, breach of any other court order, should, in the ordinary course, be served consecutively."

[46] I conclude that the periods of imprisonment imposed in this case for each of the threat offences should be ordered to be served on a concurrent basis. Though there were three separate victims involved, the threats all occurred at the same time and were intermixed in the confrontation which occurred (see ***Freake***, at paragraph 36). However, the period of imprisonment for the breach of probation offence is ordered to be served on a consecutive basis to reflect its separate and distinct nature and to ensure that Mr. Putt does not receive a free ride for having breached a court order.

[47] This formulation would result in a total period of six months imprisonment being imposed. Is this a proportionate sentence? In ***R. v. Squires***, [2012] N.J. No. 101, the Court of Appeal indicated that a trial judge must ensure that any sentence imposed is not "unduly long or harsh in the sense that it is disproportionate to the gravity of the offences and the degree of responsibility of the offender."

## PROPORTIONALITY/TOTALITY

[48] In ***R. v. C.A.M.***, [1996] 1 S.C.R. 500, it was held, at paragraph 40, that it "is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender." The

Supreme Court of Canada described the importance of the proportionality principle in the following manner:

> …the principle of proportionality in punishment is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may only be imposed on those actors who possess a morally culpable state of mind. In discussing the constitutional requirement of fault for murder in *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645, I noted the related principle that "punishment must be proportionate to the moral blameworthiness of the offender", and that "those causing harm intentionally [should] be punished more severely than those causing harm unintentionally". On the principle of proportionality generally, see *R. v. Wilmott*, [1967] 1 C.C.C. 171, at pp. 178-79 (Ont. C.A.); *Sentencing Reform: A Canadian Approach*, supra, at p. 154.

[49] In ***Hutchings***, the Court of Appeal indicated that section 718.2(c) of the *Criminal Code* "requires consideration of whether a combined sentence is unduly long or harsh 'where consecutive sentences are imposed'. On its plain reading, this means that considerations of totality are engaged in all cases involving the potential imposition of consecutive sentences." The Court of Appeal held that after determining an appropriate sentence for individual offences and then determining if those sentences should be served concurrently or consecutively, the next two steps required are the following:

> The approach is to take one last look at the combined sentence to determine whether it is unduly long or harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender.

> In determining whether the combined sentence is unduly long or harsh and not proportionate to the gravity of the offence and the degree of responsibility of the offender, the sentencing court should, to the extent of their relevance in the particular circumstances of the case, take into account, and balance, the following factors:
>
> > (a) the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;
> >
> > (b) the number and gravity of the offences involved;
> >
> > (c) the offender's criminal record;
> >
> > (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;
> >
> > (e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.

[50] I conclude that considering the nature of the offences committed by Mr. Putt; the separate victims involved; the presence of a baseball bat and the movement toward the victims; and his prior related criminal record, that a period of six months imprisonment is not unduly long or harsh. It is not disproportionate to the gravity of the offences committed by Mr. Putt and his degree of responsibility for them. That leaves one final question: what about the pre-sentence custody?

## PRE-SENTENCE CUSTODY

[51] Section 719(3) of the *Criminal Code* limits any "credit" provided by a sentencing court for pre-sentence custody to one day for each day in custody:

> In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

[52] Section 719(3.1) of the *Criminal Code* allows the Court to grant an enhanced credit. It states as follows:

> Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

[53] The British Columbia Court of Appeal recently considered the combined effect of sections 719(1) and (3.1) of the *Criminal Code* in its decision in ***R. v. Bradbury***, 2013 BCCA 280. In ***Bradbury***, the Court of Appeal adopts an interpretation which would significantly limit the application of section 719(3.1) of the *Criminal Code*.

[54] In ***Bradbury***, the accused was sentenced to a period of twenty months imprisonment for the commission of a *Controlled Drugs and Substances Act*

offence. The trial judge granted the accused a credit of one day for each day in pre-sentence custody and an enhanced credit for the time between his guilty plea and sentence. The accused appealed. The British Columbia Court of Appeal described the issue raised by the appeal in the following manner:

> This appeal requires the Court to determine the intention of Parliament in enacting ss. 719(3) and 719(3.1) of the *Criminal Code*, R.S.C. 1985, c. C-46 in order to correctly apply those provisions to the calculation of credit for pre-sentence custody in the circumstances of this case.

[55] The British Columbia Court of Appeal indicated that sections 719(3) and 719 (3.1) of the *Criminal Code* "reflect a clear policy change from the old regime. There is no dispute that, in enacting these provisions, Parliament intended to limit the exercise of judicial discretion in the granting of credit for pre-sentence custody." The Court of Appeal held that "that Parliament intended to replace the previous 2:1 practice with a new statutory general rule of up to 1:1 credit for the loss of remission or parole eligibility, and/or the lack of programs in remand custody." The Court of Appeal concluded that "circumstances that would justify enhanced credit must have a qualitative characteristic; that is, a characteristic that is individual to the offender but also distinct from those characteristics that are universal to, or

almost universally held, by other similarly situated offenders" (at paragraph 48):

> I also agree with the other appellate decisions that the exception in ss. (3.1) does not require "exceptional" circumstances and that circumstances that will justify enhanced credit must be personal to the individual offender. In my opinion, however, circumstances that would justify enhanced credit must have a qualitative characteristic; that is, a characteristic that is individual to the offender but also distinct from those characteristics that are universal to, or almost universally held, by other similarly situated offenders. Examples of commonly held circumstances might include the lack of programs, the conditions of the remand institution, and the loss of remission or parole eligibility. Individual qualitative circumstances might include the imposition of segregated or protective custody through no fault of the accused, the harsh effect of remand conditions because of a particular health issue by an accused, or a delay in the proceedings that is not attributable to the accused. Stated otherwise, circumstances to justify enhanced credit must be ones that are outside of the common experience of most offenders in remand custody.

[56] Thus, though "exceptional circumstances" need not be established for an enhanced credit to be granted, there must be circumstances which are individualized. In other words, the normal impact and effect of pre-sentence custody cannot result in an enhanced credit being granted because this would effectively abolish section 719(3) of the *Criminal Code*.

[57] In ***R. v. Peddle***, 2013 CanLII 33280 (NL PC), I had the opportunity to consider a number of recent Court of Appeal judgments which have considered sections 719(3) and (3.1) of the *Criminal Code*. Based upon

that review and considering ***Bradbury***, I would summarize their combined effect in the following manner:

(1) the provision of any credit for pre-sentence custody is discretionary rather than mandatory (***Morrison-Lonie***);

(2) though the granting of credit for pre-sentence custody is discretionary, as "a general rule, credit as set out in section 719(3) should be given for time spent in custody prior to sentencing unless there is some good reason for denying it" (***English***);

(3) section 719(3) of the *Criminal Code* is designed "to limit a judge's discretion in determining the amount of credit to grant an offender for pre-sentence custody." Parliament intended "to change the *status quo*, under which sentencing judges generally granted two days credit for each day in custody, and implement a different approach to sentencing" (***Mayers*** and ***Bradbury***);

(4) section 719(3) of the *Criminal Code* is designed "to reduce the credit available for the population of offenders detained before sentencing" (***Clarke***):

(5) there is a "presumption" that a credit of one day will be granted for each day in pre-sentence custody (***Khan***);

(6) any pre-sentence custody credit granted should be on the basis of one day for each day spent in pre-sentence custody "unless there is some good reason for denying it" (***Stonefish***);

(7) section 719(3.1) allows for a credit of one and one-half days to be granted [an enhanced credit] for each day spent in pre-sentence custody "if necessary to achieve a fair and just sanction in accordance with the statutory scheme for sentencing and punishment set out in the *Code*" (***Summers***);

(8) the granting of an enhanced credit pursuant to section 719(3.1) requires the accused to establish "on the balance of probabilities, that the circumstances justify it, in their individual case" (***Stonefish***);

(9) it is not necessary for the offender to establish that "extraordinary circumstances" exist in order for an enhanced credit to be granted (***Johnson*** and ***Bradbury***); and

(10) it has been held that section 719(3.1) allows for an enhanced credit to be granted in order to reflect ineligibility for remission and parole, but there must be a "basis in the evidence or the information before the sentencing judge to support the conclusion that this factor merits enhanced credit for a particular offender in a given case"

(***Summers*** and ***Carvery***). However, it has also been held that the "circumstances that would justify enhanced credit must have a qualitative characteristic; that is, a characteristic that is individual to the offender but also distinct from those characteristics that are universal to, or almost universally held, by other similarly situated offenders" and thus, commonly held characteristics by those in pre-sentence custody such as a loss of remission will not be eligible for an enhanced credit (***Bradbury***).

[58] In my view, ***Bradbury*** is correct. If loss of remission automatically results in an enhanced credit being granted then Parliament's intent in amending section 719 of the *Criminal Code* is defeated. The factors put forward in support of a request for enhanced credit must be individualized ones. Thus, the type of circumstances which are common to all pre-sentence custody offenders do not constitute circumstances which would "justify" the granting of an enhanced credit.

[59] In this case, there was no evidence presented to support the granting of an enhanced credit or any basis upon which it would be judicially appropriate to grant such a credit. Accordingly, Mr. Putt will be given twenty-three days credit for the twenty-three days spent in pre-sentence custody. The effect being that Mr. Putt is sentenced to a period of six

months imprisonment minus twenty-three days. The next question is: should this be served on a conditional basis?

## A CONDITIONAL PERIOD OF IMPRISONMENT?

[60] In determining if a conditional period of imprisonment is appropriate, two questions must be answered: (1) would the imposition of a conditional period of imprisonment endanger the safety of the community or (2) be inconsistent with the fundamental principles of sentencing set out in the *Criminal Code*? In this case, I conclude that the answer to both questions is: yes. Let me explain.

[61] I conclude that based upon the nature of the offences committed by Mr. Putt, and his prior convictions for assault and uttering threats, he constitutes a danger to the safety of the community. Mr. Putt created a very volatile situation on September 13, 2012. I conclude that there is a significant risk of him re-offending by committing an offence involving violence. I conclude that this risk cannot be reasonably managed through the imposition of conditions in a conditional sentence order because Mr. Putt has illustrated that he will not comply with court orders (see ***R. v. Nickles***, 2013 BCCA 151, at paragraph 22). Mr. Putt has eight previous convictions for breaching court orders and was subject to a probation order when he committed his present offences. I appreciate that Mr. Putt has

complied with his present recognizance, but his criminal record contains too many failures to comply with court imposed conditions for a conditional sentence order to be appropriate in this case. Finally, I conclude that the imposition of a conditional period of imprisonment is not consistent with the fundamental principles of sentencing set out in the *Criminal Code*. The primary principles of sentencing which must be emphasized in this case are denunciation and specific deterrence. I conclude that based upon the present offences and Mr. Putt's numerous related convictions, a community based sentence will fail to deter him and it will fail to denounce such a public display of contempt for the law and court orders. Therefore, the period of imprisonment imposed will be one involving incarceration. This will be followed by a period of probation of twelve months probation.



**THE CONDITIONS OF PROBATION**

[62] In addition to the statutory conditions which apply, Mr. Putt must:

-report to a probation officer in person as required;

-comply with all directions received from his probation officer;

-attend all counseling or treatment sessions arranged by his probation officer; and

-refrain from having any contact or communication with Ms. Jaclyn Pope or Mr. Christopher Butt.

**A VICTIM SURCHARGE**

[63] The imposition of victim surcharges would constitute an undue hardship for Mr. Putt. Thus, the payment of the victim surcharges is waived.

**A DEOXYRIBONUCLEIC ORDER**

[64] Section 264.1(1)(a) of the *Criminal Code* is a “secondary" designated offence. Thus, I may issue an order authorizing the taking of bodily substances from Mr. Putt if satisfied that it is in the best interests of the administration of justice to do so. Section 487.051(3) of the *Criminal Code* indicates that in determining whether or not to issue a DNA order, I must consider the offender's "privacy and security."

[65] There are significant societal interests involved in the collecting of DNA samples, but the issuing of such an order is neither mandatory nor absolute. In this case, considering Mr. Putt’s criminal record and the nature of the offences committed by him, I am satisfied that it would be in the best interests of the administration of justice to issue a DNA order. Thus, an order in Form 5.04 is hereby issued.

## A WEAPON/AMMUNITION PROHIBITION

[66] Section 110 of the *Criminal Code* allows me to issue a weapon/ammunition prohibition if the offender has committed an offence "in the commission of which violence against a person was used, threatened or attempted" and I am satisfied that "it is desirable, in the interests of the safety of the person or of any other person, to make an order." As we have seen, Mr. Putt has committed an offence which involved threatened violence. I conclude that based upon his present offences and his previous convictions, such an order is highly desirable. Thus, a section 110 *Criminal Code* order is hereby issued for a period of five years.

## CONCLUSION

[67] For the reasons provided, Mr. Putt is sentenced to a period of six months, minus twenty-three days, incarceration followed by twelve months of probation.

[68] Judgment accordingly.