

**PROVINCIAL COURT OF NEWFOUNDLAND & LABRADOR**

**Citation:** *R v Drake (sentence)*, 2023 NLPC 0822A00132

**Date:** July 31, 2023

**Docket:** 0822A00132, 0822A00200, & 0822A00221

**Registry:** Grand Bank

**Between:**

HIS MAJESTY THE KING

v.

AMY ELIZABETH DRAKE

<b>Judge:</b>	The Honourable Judge H. J. Porter
<b>Heard:</b>	July 19, 2023
<b>Decision</b>	July 31, 2023
<b>Charges:</b>	0822A00132-001 Assault 0822A00132-002 Mischief by damaging property 0822A00132-003 Failure to comply with Probation Order 0822A00200-001 Failure to comply with Probation Order 0822A00200-002 Failure to comply with a release order 0822A00221-001 Unlawfully causing an animal unnecessary suffering 0822A00221-002 Failure to comply with Probation Order 0822A00221-003 Failure to comply with a release order
<b>Counsel:</b>	A. Manning, for the Crown S. MacDonald, for the Accused

**By the Court:****INTRODUCTION**

[1] The accused was convicted of three separate criminal adventures. In July, 2022, she assaulted her then intimate partner, interfered with the use and enjoyment of his property, and breached her probation order. In October, 2022, she breached her bail and probation conditions by having contact with another former intimate partner. In November, 2022, she was seen on the “Tik Tok” video application kicking her cat, and also breaching her bail and probation order conditions.

[2] The complete reasons for the convictions are set out at **R v Drake**, 2023 CanLII 39084 (NL PC), 2023 CarswellNfld 121 (NLPC), and **R. v. Drake**, [2023] N.J. No. 100 (PC) (Quicklaw), and need not be repeated here. These are the reasons for her being sentenced to a net sentence of 160 days in custody.

**The circumstances and antecedents of the accused.**

[3] The accused is a 42 year old single mother of three children, ages 15, 17, and 21 years. She is not a first offender. I have sentenced her multiple times in the past, as I will here summarize. In 2008, I suspended the passing of sentence and

placed her on probation for an assault. In 2010, I did the same thing when she was convicted of theft. In 2021, I ordered a conditional sentence for being unlawfully in a dwelling house, resisting arrest, breach of undertaking, and breach of a release order. These noncustodial sentences have failed to deter the accused from re-offending.

[4] In her **Criminal Code** s. 726 allocution, the accused said that she needs help with anger management, and that she did not hurt her cat.

### **The positions of the parties**

[5] The Crown seeks a total term of imprisonment of nine to twelve months. In summary, this would include four to five months for the assault on her then intimate partner Mr. White, two months for breaching the no-contact order about her former intimate partner Mr. Clarke, and three to four months for kicking the cat down the flight of stairs.

[6] Counsel for the accused said that the accused has been diagnosed with a borderline personality disorder and that her mental health diagnosis is a mitigating factor on sentencing. As a result, he said, she should be sentenced to a conditional sentence of two years less a day, served as a conditional sentence in the community.

## Mental health and sentencing

[7] In **R. v. Peters**, 2000 NFCA 55, at paragraph 19, Green J. recognized that mental illness can be considered a mitigating factor on sentence, to the extent that the focus of the sentencing should promote rehabilitation and treatment.

[8] In **R. v. Martin**, 2018 NLCA 12, the Court accepted that the accused's mental health issues were properly considered as a mitigating factor in sentencing.

[9] In **R. v Bourgeois**, 2018 NLCA 13 (CanLII), at paragraph 24, the Court of Appeal said that

There are two ways in which an offender's mental health condition may affect the determination of an appropriate sentence: first, as a mitigating factor where the offender's mental health may reduce his or her culpability or responsibility for the offence; and, second, where the offender's mental health condition may be relevant in determining the offender's prospects for rehabilitation or the likelihood to reoffend.

[10] At paragraph 26, the Court of Appeal said as follows:

In general, the circumstances when an offender's mental health may be a mitigating factor in determining an appropriate sentence, by reducing the offender's culpability or responsibility for the offence, will depend on the particular facts. *To be a mitigating factor, there must be a nexus or connection between the mental health condition and the offence. Whether that nexus exists is a fact-specific determination. Similarly, the extent to which the offender's mental health is a mitigating factor, thereby reducing the offender's culpability or responsibility, will depend on the particular circumstances.* (emphasis mine)

[11] There is no evidence here that culpability of the accused for the assault, mischief, breaches of probation or bail conditions and the animal cruelty offences were in any way reduced because of her mental health. Secondly, since she has consistently terminated or declined mental health services, her mental health has little relevance to her prospects for rehabilitation. The court can order her to attend counseling, and has done so in the past, without success.

[12] Counsel for the accused said that she has been diagnosed as having a borderline personality disorder. The accused said that she needs “anger management”. The presentence report, page 6, says that the accused has been diagnosed with anxiety, depression, and borderline personality disorder.

[13] On the same page of the presentence report we are told that, while she had been referred to Mental Health and Addictions services, her file closed “*because she was not interested in services.*”

[14] Page 7 of the presentence report refers to diagnoses of borderline personality disorder, persistent depressive disorder, anxiety disorder (not otherwise specified) and substance use disorder (marijuana). In February 2023, when confronted with the fact that she was not taking her prescribed medications, the accused said that she had a lot going on with court, and she forgets to take her medication.

[15] At page 9 of the presentence report, the accused is quoted as saying that “a lot of it I didn’t do”. She claimed self defence for having assaulted her then intimate partner, and she denied having kicked her cat over the flight of stairs.

[16] To put these remarks in context, the self defence claim was rejected at trial, and three independent witnesses contacted the police to report that they had watched (by way of the internet) the accused kick the cat downstairs.

### **Sentencing goals, ranges, and procedure**

[17] All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender<sup>1</sup>. The principles of parity and individualization, while important, are secondary principles<sup>2</sup>.

[18] The phrase “range of sentence” is susceptible to different meanings<sup>3</sup>. Ranges of sentence are guidelines rather than hard and fast rules. A judge can order a sentence outside that range so long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of

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<sup>1</sup> See **Criminal Code** s. 718.1 and **R. v. Friesen**, 2020 SCC 9 (CanLII), [2020] 1 SCR 424, at para 30.

<sup>2</sup> See **R. v. Parranto**, 2021 SCC 46 (CanLII), at para 10.

<sup>3</sup> See **R. v. O’Flaherty** (1997), 1997 CanLII 14649 (NL CA), 155 Nfld. & P.E.I.R. 150 (NFCA) at para 20.

appropriate sentences is not necessarily unfit<sup>4</sup>. Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives<sup>5</sup>.

[19] When sentencing an accused person for multiple offences, our Court of Appeal has adopted a three-step approach to be applied in sentencing for multiple offences. The first step is to assign an appropriate sentence to each offence. The second step is a consideration of whether any of the offences should be served concurrently or consecutively. The third step is the application of the principle of totality<sup>6</sup>. As noted above, the accused at Bar committed three distinct criminal adventures. We begin with the first step, assigning an appropriate sentence to each offence.

### **Range of sentence for assault of intimate partner.**

[20] The statutory range for assault, when prosecuted summarily, is from a discharge to two years in custody<sup>7</sup>. The actual range of sentence as set out in the

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<sup>4</sup> See **R. v. Nasogaluak**, 2010 SCC 6, [2010] 1 S.C.R. 206 at para 44.

<sup>5</sup> See **R. v. Lacasse**, 2015 SCC 64 (CanLII), [2015] 3 SCR 1089, at para 57.

<sup>6</sup> See **R. v. Hutchings**, 2012 NLCA 2, **R. v. O'Quinn**, 2017 NLCA 10, and **R. v Bennett**, 2017 NLCA 41 (CanLII).

<sup>7</sup> See **Criminal Code** s. 266 and s. 787.

jurisprudence is narrower: sentences for assault range from a conditional discharge to six months in prison<sup>8</sup>. The fact that the victim of the assault is or was an intimate partner is an aggravating factor on sentence<sup>9</sup>. As a result the sentence for assaulting a former intimate partner will usually be more severe than the sentence for the assault of a stranger. Given the aggravating factor of the victim being a former intimate partner, a sentence at the higher end of the range is appropriate. It is also noted that the assault resulted in a cut to the inside of the victim's lip.

### **Range of sentence for unlawfully causing an animal unnecessary suffering**

[21] Three independent witnesses contacted the RCMP to report that they had seen the accused kick her cat over a flight of stairs. While there was no evidence of any permanent or serious injury to the cat, it was clear that kicking the cat was a gratuitously violent act which caused the cat unnecessary suffering. It is in that context that we now consider some precedent decisions on the range of sentence for the offence.

[22] To put the animal cruelty offence in statutory context, s. 445.1(2)(b) of the **Criminal Code** provides for a sentence when prosecuted summarily of a fine of

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<sup>8</sup> See **R. v. Norman**, [2011] N.J. No. 214 (P.C.), at para 38.

<sup>9</sup> See **Criminal Code** s. 718.2(a)(ii).



not more than \$10,000 or to imprisonment for a term of not more than two years less a day, or to both.

[23] In **R. v. Power**, 2003 CanLII 20379 (ON CA), the respondent pled guilty to one count of cruelty to animals and a mischief charge. He and two others captured a healthy domestic cat belonging to an unknown third party and took it to an abandoned building. They proceeded to torture and finally kill the helpless animal. The respondent videotaped this process. The police, acting on information received from a roommate of the respondent, went to his apartment. They discovered the skinned body of the cat hanging in the refrigerator. The cat's head was in a zip lock bag in the freezer. The police also located the videotape made of the torturing and killing of the cat. The accused was sentenced to 90 days intermittent on the cruelty to animals charge and to a consecutive, conditional 18 month sentence followed by three years' probation on the mischief charge. The Crown appealed the sentence. The Court of Appeal deferred to the sentencing judge, and dismissed the appeal.

[24] In **R. v. Barrett**, 2015 CanLII 13906 (NL PC), the accused had neglected a menagerie of seven calves, one goat, one pony and thirteen sheep by depriving them of a sufficient quantity and quality of food to allow for normal, healthy growth and maintenance of normal, healthy bodyweight contrary to section 445.1

of the Criminal Code. As a result of his mistreatment of the livestock, many of them starved to death or were so malnourished that they had to be put down. He had been cautioned by a veterinarian about the state of his farm and the condition of his livestock.

[25] At paragraph 18 of the decision in **Barrett**, I set out a number of precedents which supported a range of sentence from a conditional sentence to six months served in an institution. Barrett was sentenced to six months in custody.

[26] In **R v Alcorn**, 2015 ABCA 182 (CanLII), the accused had pleaded guilty to three counts: (1) cruelty to an animal under s 445.1(1)(a) of the Criminal Code (20 months imprisonment followed by 3 years' probation); (2) assault of ND under s 266 of the Criminal Code (3 months consecutive); and (3) breach of recognizance under s 145(3) of the Criminal Code (1 month consecutive). He appealed the total sentence of 24 months in prison. The cruelty to animal charge had been committed by cutting a cat's throat and using the cat's blood in a bizarre sexual ritual. At paragraph 39, the Alberta Court of Appeal declined to interfere with the 20 month sentence for the cruelty to animal charge.

[27] In **R. c. Houle**, 2018 QCCQ 7122 (CanLII), the accused was sentenced to one month in prison on one count and four months consecutive on another count

for having willfully neglected to provide food, water, and necessities of life to a cat and two dogs.

[28] In **R. v. Florence**, 2018 ONCJ 872 (CanLII), the accused had pleaded guilty to animal cruelty committed when he had stabbed a dog. He had also committed other offences, including uttering threats to cause death to a person and breach of probation. The accused in that case had been in a drug-induced psychosis. The Court said, at paragraph 37, that an appropriate sentence for the animal cruelty offence was six months.

[29] In **R v Chen**, 2021 ABCA 382, the accused had pleaded guilty to a single count of animal cruelty, which had been committed by beating his ten-month-old puppy, relentlessly, for over 20 minutes. He kicked it, dragged it across the floor, and threw it into a wall. An alarmed neighbour tried to stop the assault but Mr. Chen turned her away. The puppy sustained a broken paw, broken teeth, scleral hemorrhaging in one of its eyes and blunt force trauma to its right hind leg, the left side of its head, and the abdomen.

[30] Chen was sentenced to 90 days to be served intermittently, followed by 2 years' probation. He appealed, successfully, and had the sentence reduced to a

conditional sentence, served in the community. The Crown appealed that decision, and the original sentence of 90 days was upheld.

[31] At paragraph 33 of *Chen*, the Alberta Court of Appeal recognized animal cruelty as a crime of violence, saying as follows:

A crime of violence is generally understood as an act of physical aggression or threat of physical aggression that results in harm to the victim. There can be no disputing that animals are sentient beings that are capable of experiencing pain and suffering and can be victims of violence. The animal cruelty provisions are aimed at protecting animals themselves from wilful acts of violence and the wilful infliction of pain and suffering.

[32] In *R v Ehbrecht*, 2022 ABPC 141 (CanLII), the accused pleaded guilty to five counts of animal cruelty contrary to section 445.1(1)(a) of the Criminal Code of Canada. He had physically abused five kittens. Two of the kittens were so severely injured they had to be euthanized. The charges were prosecuted by indictment. Stirling, P.C.J., found, at paragraph 5, that a conditional sentence order would not give adequate effect to principles of denunciation and general deterrence and would not be consonant with the directions from the Alberta Court of Appeal in *R v Chen*, 2021 ABCA 382.

[33] *Ehbrecht* was sentenced to 12 months in custody followed by three years' probation.

[34] In **R. v. Carr**, 2023 ONCJ 22 (CanLII), the accused had pleaded guilty to having killed a dog by throwing it off a balcony. At paragraph 66, Justice Jones said as follows:

Mr. Carr is not a first-time offender. While there should be credit for his early guilty plea, there are multiple aggravating factors as well. Those who abuse animals through these senseless acts of cruelty will be governed primarily by the sentencing principles of deterrence and denunciation. This was a crime of violence, and it will be treated as one accordingly. A 12-month custodial sentence on this count will be imposed. *Had it not been for the guilty plea and expression of remorse, an even higher sentence would be appropriate.* (italics added)

[35] While every case is unique, these cases suggest a trend of incarceration for the offence of causing an animal unnecessary suffering. It must also be noted that the accused was on bail and on probation when she kicked the cat over the flight of stairs.

### **Range of sentence for breach of “no-contact” bail condition & breach of probation**

[36] The range of sentence for breach of a court order has generally been from one to three months imprisonment<sup>10</sup>, and "sometimes less"<sup>11</sup>. The breach of a “no contact” bail condition is much more serious than missing a curfew time or failing

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<sup>10</sup> See **R. v. Murphy**, 2011 NLCA 16 (CanLII), and **R. v. Hunt**, 2015 NLTD(G) 82).

<sup>11</sup> See **R. v. Hutchings**, 2012 NLCA 2 (CanLII) at para 99.

to sign in at a police station. When the accused breaches a “no contact” bail condition and contacts the victim, she is communicating to him that he is powerless to stop her, and that the courts and the police cannot stop her from contacting him.

### **Placing the accused on the sentencing spectrum, step one: individual sentences**

[37] Taking into account the circumstances of the commission of the various offences, the respective ranges of sentence, and the circumstances of the accused, sentences in the first of the three-step procedure should be as follows:

0822A00132-001 Assault	60 days
0822A00132-002 Mischief by damaging property	10 days
0822A00132-003 Breach of Probation	30 days
0822A00200-001 Breach of Probation	30 days
0822A00200-002 Breach of release order	30 days
0822A00221-001 Unlawfully causing an animal unnecessary suffering	90 days
0822A00221-002 Breach of Probation	30 days
0822A00221-003 Breach of release order	30 days

[38] If all sentences are made consecutive, this results in a sentence of 310 days.

### **Step two: consecutive or concurrent sentences?**

[39] As a general rule, sentences for separate criminal offences should be consecutive. 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<sup>12</sup>.

[40] Another general rule in sentencing in this jurisdiction is that sentences for breach of court orders should be made consecutive to the sentence imposed for the concomitant substantive offence<sup>13</sup>.

[41] As a result, the sentences for the three criminal adventures committed by the accused should, subject to totality concerns, be made consecutive.

### **Step three: totality**

[42] A sentence of 310 days for these offences is disproportionate to the moral culpability of the accused. To achieve a proportionate sentence, I will make the sentences for the mischief, the breach of bail condition, and the related breaches of probation concurrent to the sentences for the assault and the causing unnecessary suffering to the cat. The sentence for the breach of the no-contact order will be

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<sup>12</sup> See **R. v. Crocker**, 1991 CanLII 2737 (NL CA)

<sup>13</sup> See **R. v. Hennebury** (1996), 1996 CanLII 11081 (NL CA), 138 Nfld. & P.E.I.R. 56 (NLCA), at paragraph 7.

consecutive, but the sentence for the concomitant bail breach will be concurrent.

This results in a significant reduction in sentence, as follows:

Assault	60 days
Mischief by damaging property	10 days, concurrent
Breach of Probation	30 days, concurrent
Breach of Probation	30 days, consecutive
Breach of release order	30 days, concurrent
Unlawfully causing an animal unnecessary suffering	90 days consecutive
Breach of Probation	30 days, concurrent
Breach of release order	30 days, concurrent

[43] I realize that making the sentences for breaches of probation and bail conditions concurrent may run afoul of the general rules mentioned above, but I cannot in good conscience reduce the sentences for the assault and the violence to the animal sentence. Nor should the accused get a “free ride”<sup>14</sup> for breaching the orders that were meant to keep her away from Steven Clarke.

[44] Subject to adjustment for remand credit, the total sentence is 180 days: 60 days for assaulting Terry White and related breaches, 30 days consecutive for contacting Steven Clarke, and 90 days for kicking the cat down the flight of stairs.

### **Where should the sentence be served?**

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<sup>14</sup> See **R. v. Cyncora**, 1992 CanLII 1398 (BC CA) at para 10.



[45] **Criminal Code** s. 742.1 provides for a sentence to be served in the community, subject to conditions. By her antecedents, we know that the accused does not comply with the conditions of her court orders, including bail and probation conditions. In that context, it is unrealistic to order her to serve a conditional sentence when we already know that she ignores court orders. As indicated above, non-custodial sentences have failed to correct her behaviour. Allowing her to serve a conditional sentence is not consistent with the fundamental purpose and principles of sentence. She must serve the sentence in an institution.

### **Ancillary orders**

[46] There are a number of ancillary orders, as follows:

- 1) Probation for 12 months from release from custody, with the following conditions:
  - a) keep the peace and be of good behaviour;
  - b) abstain from communicating, directly or indirectly, with Terry White and Steven Clarke;
  - c) appear before the court when required to do so by the court;
  - d) 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;

- e) report to a probation officer within two working days of being released from custody, and thereafter, when required by the probation officer and in the manner directed by the probation officer;
  - f) attend counselling as directed by the probation officer, including, but not limited to, counselling for anger management and mental health issues; and
  - g) do not allow any animal inside your residence or on the property adjacent thereto.
- 2) A DNA order is discretionary in assault cases which are prosecuted summarily. DNA evidence can exonerate the falsely accused, and can identify the person who has committed an offence. Taking DNA samples is not invasive: it is usually done using either a blood sample or a buccal swab. It is in the public interest to include offenders' details in the databank. The police are authorized to take such samples of bodily substance(s) as may be required to enter the particulars of the accused in the national DNA databank. The collection of the DNA samples is ordered forthwith.
- 3) Pursuant to **Criminal Code** s. 110, and in relation to the assault of Terry White, the accused is prohibited from the possession of firearms, ammunition, or explosive devices or substances for five years.
- 4) Pursuant to **Criminal Code** s. 490.1(1)(a), Goober the cat is ordered forfeit to the Province.
- 5) Pursuant to **Criminal Code** s. 447.1(1)(a), the accused is prohibited from owning, having the custody or control of or residing in the same premises as an animal or a bird during five years.
- 6) Pursuant to **Criminal Code** s. 447.1(1)(b), the accused is ordered to pay restitution for the veterinarian invoice in the amount of \$166.75, which she must pay within 12 months. Given her limited circumstances and her incarceration, she is not being ordered to pay the SPCA invoice of \$4,080.00 for caring for Goober.

[47] Given the restitution order and her incarceration, the victim surcharges are waived.

### **Remand credit**

[48] The accused was remanded into custody on July 19, 2023, and has been in custody now for 13 days. Using a credit ratio of 1:1 ½ , her sentence is reduced by 20 days for the time spent in custody awaiting sentence. The warrant of committal should show the 20 day credit as reducing the sentence for the animal cruelty offence from 90 to 70 days.

### **CONCLUSION**

[49] A net sentence of 160 days, with ancillary orders, is ordered.

H. J. Porter, P.C.J.